Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 21 NOVEMBER 18, 1987 No. 46

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 87–136)

RECORDATION OF TRADE NAME: "TWO'S COMPANY"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On August 3, 1987, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "TWO'S COMPANY" was published in the Federal Register (52 FR 28774). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than October 3, 1987. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "TWO'S COMPANY" is recorded as the trade name used by Two's Company, a corporation organized under the laws of the State of New York, located at 33 Bertel Avenue, Mount Vernon, New York 10550. The trade name is used in connection with the following merchandise manufactured in Japan, Hong Kong and Taiwan: acrylic and glass vases; stirrers; glass picture frames; glass products; floral accessories; commercial flowers containers; Christmas ornaments; silver and silver plated products; napkin rings and vinyl products.

DATE: November 9, 1987.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

Dated: November 3, 1987.

JERRY C. LADERBERG,
Acting Chief, Entry, Licensing,
and Restricted Merchandise Branch.

[Published in the Federal Register, November 9, 1987 (52 FR 43148)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 141, 178

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO ENTRY OF CONSOLIDATED SHIPMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations relating to the entry procedures for consolidated shipments of imported merchandise. The Tariff Act of 1930 allows the consignee of imported merchandise to designate a Customs broker to make entry. Small shipments of merchandise having various consignees are more efficiently and effectively handled if consolidated into large shipments under a master bill of lading or master air waybill prepared by a foreign freight consolidator which covers the numerous individual packages in the shipment. The foreign freight consolidator usually consigns the consolidated shipment to a freight forwarder, courier service or other party in the U.S. This consignee is normally not the same consignee identified on the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill. When the consignee named in the master bill of lading or master air waybill appoints a broker of its own choosing to make entry, the actual consignees of the merchandise named in the individual bills are often frustrated in two respects. First, the entry is made by a broker not of their choosing and, second, entry is made at a port not of their choosing. The amendment revises the entry procedures to prevent frustration of the wishes of the actual consignees identified on the individual bills. After consideration of comments received on the previous notice concerning this matter, certain modifications have been made to the proposal and it is being republished for further comments.

DATES: Comments must be received on or before January 4, 1988.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2324, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C.

20229. Comments relating to the information collection aspects of the proposal should be addressed to Customs, as noted above, and also the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20003.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Entry, Licensing, and Restricted Merchandise Branch (202–566–5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

A Customs broker is a person who is licensed by the Customs Service to transact Customs business on behalf of importers and other persons. As amended in 1983 by Pub. L. 97–446, § 484(a)(1)(C), Tariff Act of 1930, as amended (19 U.S.C. 1484(a)(1)(C)), provides that when an entry of imported merchandise is made, the required documentation shall be filed either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a Customs broker. A problem has arisen with respect to the appointment of a broker by consignees of consolidated shipments.

Small shipments of merchandise having various consignees are more efficiently and effectively handled if consolidated into a large shipment. These consolidated shipments, which are usually packed in containers for movement to the U.S. by vessel or aircraft, have two sets of documents. One set of documents consists of a master bill of lading (for vessel movements) or a master air waybill (for aircraft movements) covering the container and its contents. Individual bills of lading or individual air waybills, also known as "house" bills of lading or "house" air waybills, comprise the second set of documents. The master bill of lading or master air waybill is prepared by a foreign freight consolidator who ordinarily consigns the container to a freight forwarder, courier service or similar party in the U.S. The consignee designated by the foreign freight consolidator is normally not the same consignee identified on the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill. When the consignee named in the master bill of lading or master air waybill appoints a broker of its own choosing to make entry, the actual consignees of the merchandise named in the individual bills are often frustrated in two respects. First, entry is made by a broker not of their choosing and second, entry is made at a port of entry not of their choosing. Further, additional expenses may be incurred.

To prevent the foregoing situation from happening, a notice was published in the Federal Register on December 24, 1985 (50 FR 52532), proposing to amend § 141.11, Customs Regulations (19 CFR 141.11), relating to evidence of the right to make entry for importations by common carrier, by adding a new paragraph (c) covering

consolidated shipments. The proposal provided that in the case of consolidated shipments by common carrier, entry would not be made by a broker appointed by the consignee named in the master bill of lading or master air waybill if (1) a consignee on any one of the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill has designated another broker to make entry, or (2) any one of the individual bills of lading or individual air waybills indicates that entry will be made by the actual owner or purchaser.

If entry is made by a broker appointed by the consignee named in the master bill of lading or master air waybill, the broker would submit with the entry filed with Customs a signed statement to the effect that none of the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill have: (i) designated a broker, or a different broker from the one identified in the master bill of lading or master air waybill; or (ii) indicated that entry will be made by the actual owner or purchaser; or (iii) specified that entry is to be made at a different port of entry. the statement may be stamped, typed or printed on the entry documentation provided to Customs. It would not be treated as a missing document for which a bond may be provided (See § 141.66, Customs Regulations (19 CFR 141.66)). If the signed statement is not submitted, separate entry would be made for each package in the consolidated shipment by the importer of record or its broker, as appropriate. Shipments for which no entry is made would be placed in general order pursuant to § 4.37, Customs Regulations (19 CFR 4.37), after the expiration of the lay order period. (See § 127.1, Customs Regulations (19 CFR 127.1)).

Because the proposed amendment applies only to consolidated shipments, it would not apply to those aspects of express delivery operations, courier service operations, or similar delivery operations that do not involve consolidated shipments, or delivery operations that do not use individual house bills of lading or air waybills. Nor would the procedures apply to any shipment where the shipper contractually agrees that the carrier is the consignee and may appoint a broker of its own choosing to make entry.

Discussion of Comments

Twenty-eight comments were received in response to the original notice proposing these changes. A discussion of these comments and our responses follows.

Comment:

Two commenters claimed that there was not factual basis upon which Customs issued the proposal. Specifically, the commenters disagree with Customs statement in the notice that consignees are often frustrated when entries are made by a broker, or at a port of

entry not chosen by the consignees, and that additional expenses may be incurred.

Response:

Customs continually receives complaints from brokers who are being consistently denied business from their clients when shipments are entered without either the broker or the broker's client being contacted when a shipping document specifically directed that they be contacted. It is a real problem for both importers and brokers. Customs believes that § 201 was never intended to frustrate an importer in choosing his own broker. We believe that a problem exists and that it was fairly stated in the notice.

Comment:

Several courier services commented that people use international air couriers because they want one courier system to take full responsibility for all services required to move shipments from the sender to the addressee. Door-to-door service necessarily includes entering the shipment. Another commenter pointed out that the preamble to the notice states that the rule will not apply where the shipper contractually agrees that the carrier is the consignee and the carrier may appoint a broker of its own choosing to make entry; but it is not so stated in the rule.

Response:

We agree. The rule has been revised to include language which allows the foreign shipper to contractually agree that the carrier is the consignee for Customs purposes and may appoint a broker.

Comment:

Many comments were received concerning the use of the word "timely" in § 141.11(c). Commenters noted that Customs has not specifically provided either the manner or the number of times which the designated broker must be contacted, or how long the carrier must wait before concluding that the designated broker has failed to timely respond. There were numerous suggestions on the length of time believed to be "timely". Others commented that Customs enforcement of any time requirement would be virtually impossible because consolidators would merely attest that they unsuccessfully had attempted to contact the broker by adding a "boiler plate" certification. Others commented that if the importer has designated a broker to act on his behalf, then there should be no interference in that selection process.

Response:

After extensive consideration, Customs has concluded that the provision to allow the appointment of a broker by the consignee named in the master bill of lading or master air waybill contrary to the house bill or house air waybill consignee's specific designation, when the party does not "timely respond" should be removed from

the rule. The purpose of the amendment was to ensure that importers' specific instructions on their shipping documents were honored by carriers. Since Customs recognizes this as the problem to be corrected allowing the carrier to appoint its own broker after a period of time would frustrate that purpose. The law gives consignees, without any restriction, the right to appoint a broker of their choice. The appointment by the consignee on the house bill should be respected without any exception. Accordingly, the rule has been modified to require the merchandise to be placed in general order if the designated broker does not respond to Customs request to make entry of the shipment.

Comment:

Several commenters believe that no sanctions exist if there is a false declaration by the consignee named in the master bill of lading or master air waybill.

Response:

Section 592(a)(1)(A), Tariff Act of 1930, as amended, (19 U.S.C. 1592(a)(1)(A)), states that without regard as to whether or not the U.S. is or may be deprived of lawful duties, no person may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the U.S. by means of any document, written or oral statement, or act which is material and false, or any omission which is material, or, as stated in 19 U.S.C. 1592(a)(1)(B), may aid or abet any other person to violate subparagraph (A). Further, a broker who is involved in the transaction would be subject to sanctions under § 641, Tariff Act of 1930, as amended (19 U.S.C. 1641).

Comment:

One commenter discussed the legislative history of Pub. L. 97–446 in which the sponsors of § 201 made statements in a letter to Congressman Bill Frenzel that there was no intention that a courier service would be prevented for using a broker of its own choosing to make entries for merchandise entrusted to it for carriage.

Response:

The explanatory material contained in the proposal clearly states that the amendments are not meant to apply to "those aspects of express delivery operations, courier service operations or similar delivery operations that do not involve consolidated shipments, or delivery operations that do not use individual house bills of lading or air waybills." Also, the notice stated that "nor would it apply to any carrier where the shipper contractually agrees that the carrier is the consignee and may appoint a broker of its own choosing to make entry." We agree with those who suggested that limitations be expressly included in the rule and have made this addition.

Comment:

One commenter made an extensive legal argument concerning the meaning of the term "consignee" and cited a number of court cases which were all decided before enactment of Pub. L. 97–446. It was argued that the term "consignee" was not given a new meaning by § 201 of Pub. L. 97–446; it only restricted the legal right of the consignee who cannot qualify as an importer of record to make entry himself. He states, "after 1983, the consignee was required to retain a broker to clear shipments; an unlicensed consignee may not do the paperwork." He continues, "it appears legally impossible for Customs to divest the consignee named in the airlines' documentation (either air waybill or carrier certificate) of his legal right to make entry."

Response:

It is noted the § 201 of Pub. L. 97–446 introduced the terms "owner or purchaser" into 19 U.S.C. 1484 without defining them. Customs expanded the expression "owner or purchaser" in Customs Directive 3530–02 (November 6, 1984), to include practically any party with an interest in the goods except a nominal consignee. Since there are no statutory definitions, it is not improper for Customs to define those terms in the context of the intent of the legislation. Customs believes that § 201 was never intended to frustrate an importer's choice of a broker when it gave the consignee the right to appoint a broker.

Comment:

One commenter urged that a 6 to 9 month lead time be provided before implementation of any final rule to allow carriers sufficient time to order new bills of lading, airway bills, and other shipping documents incorporating new provisions. This will allow them time to use up their existing stocks of documents.

Response:

Inasmuch as the proposal provides that "required statement may be stamped, typed, or printed on the entry documentation provided to Customs", existing stocks can easily be used by merely rubberstamping them.

Comment:

One comment interprets the proposal as depriving an importer of the right to designate his own broker in connection with shipments arriving without his prior knowledge. It is stated that permitting consolidators who are consignees on the master bill of lading or master air waybill to designate a broker for entry purposes where none has been designated by the shipper-consignee will lead to abuses of this privilege. The commenter states that having entries prepared for the account of a consignee who has not designated a specific broker may expose the importer to Customs penalties, in-

cluding penalties under 19 U.S.C. 1592, because of unauthorized declarations made by the broker designated by the consolidator.

Response:

Instead of depriving an importer of the right to designate his broker, the proposal would protect that right where the importer is concerned enough to arrange for the designation on shipping documents. Where no broker has been designated by the shipper or U.S. importer, the consignee on the master bill of lading or master air waybill clearly has the right to appoint a broker under § 201 of Publ L. 97–446. Concerning the commenter's last statement, an entry cannot be prepared for the account of a consignee who has not designated a specific broker because the broker could not have a power of attorney from the consignee under those circumstances. Accordingly, an entry prepared by a broker under authority from a consignee who is not the owner or purchaser must make the entry in his name as importer of record, thereby obligating him and his bond for Customs duties, penalties, and liabilities.

Comment:

A commenter stated that the rule is not clear and suggested that it be changed to stress that clearances by a broker named by the consignee in the master bill of lading must be in the name of the appointed broker and not in the name of the consignee in the master air waybill. It also asked if the consignee in the master air waybill may appoint a broker for the balance of the consolidated shipment when the shipments are separated.

Response:

Amended 19 U.S.C. 1484 provides that the importer of record can only be one of three parties; owner, purchaser, or licensed broker. If the owner or purchaser is not appointing the broker to make entry, then the broker appointed by the consignee must act as importer of record. This need not be mentioned in the rule. Customs position is that once an individual shipment is removed from the consolidated shipment, the consolidated shipment is broken and the consignee named in the master bill of lading no longer has any power to appoint the broker for the remaining individual shipments. Each shipment constitutes a separate shipment for which separate entry must be made.

Comment:

One commenter suggested that the final rule specifically state that door-to-door courier, express, or overnight delivery services be defined.

Response:

Any definition at this time may prove to be obsolete in the near future, given the rapidly changing state of the courier and air carrier business.

Comment:

It is suggested that the rule should also indicate that the master bill consignee's appointment of a broker may not be made where the house bill consignee ("owner or purchaser") has given notice to the break bulk agent (master bill consignee) that a particular broker is to be used for clearance of its shipments. It is noted that any names or designations that appear on the house bills were placed there by the exporter or his agent and that while many importers request that the goods be cleared by the broker that they indicate on the house bills as the party to notify, this information often fails to appear on the bills when executed by a clerk in the country of exportation. Also, the shipper or his agent will indicate a party of his own choosing to be notified, regardless of any contrary instructions of the ultimate consignee.

Response:

This comment illustrates the inability of American importers to have their foreign shippers, their foreign shippers' agents, and common carriers honor their designations of agents in the U.S. We do not believe it is beneficial to require the consignee on the master bill of lading or master air waybill to certify to Customs that it is not aware that the individual importer stated in any shipping documents, *or otherwise,* or desired that the consignee not appoint a broker of his own choosing. This would be a nightmare for Customs to enforce, especially when it is claimed that the consolidator "knew from past experience" that the consignee used a specific broker. Instead, the rule provides a workable method to carry out the U.S. importers' desires.

Comment:

One commenter objected to the material in the last paragraph of the preamble to the notice which states that the amendment will not apply where the shipper contractually agrees that the carrier is a consignee and may appoint a broker of its choosing to make entry. He suggested that consideration be given to the terms of shipment, that is, whether such terms are "all free" (landed or delivered with all duty, freight, and clearance charges paid). Because the house bill consignee is under such circumstances only remotely related to the Customs entry transaction due to the overseas shipper still being the owner at the time the goods "crossed the Customs line", the shipper can appoint the carrier as agent for the purpose of making entry using the master bill consignee and his broker as sub-agents. In other words, the commenter urged that if Customs wishes to retain that exception it should be limited to "all free" shipments and, for sake of clarity, the preamble language should be incorporated in the final rule.

Response:

We disagree. We doubt whether in an "all free" shipment the American importer would ever have any interest in forcing the foreign shipper to specify a particular broker or notify a party to make entry in the U.S. Further, if the carrier has enough influence to have foreign shippers agree that it can appoint its own brokers to make entry, then Customs should not interfere inasmuch as § 201 of Pub. L. 97–466 gives the consignee that right.

Comment:

It was commented that the proposal does not ensure that the entry will be made at the port of the importer's choosing and suggested that when the individual bills of lading or air waybills indicate that the shipment is to be transported to a specific port of entry for Customs clearance, it be honored by the consolidator/consignee in the same manner as the designation of a specific broker.

Response:

We agree and the appropriate language has been added to the rule.

Comment:

One commenter suggested the elimination of the requirement that a specific statement must appear on the entry, signed by the consignee on the master bill of lading where such consignee is filing the entry, that none of the house bills of lading or air waybills of lading making up the master bill of lading designates a broker or actual owner who is to file the Customs entry. Instead, the commenter suggested that the regulations simply contain the prohibition against the filing of an entry in contravention of a specific designation contained in the house bills or air waybills. The commenter believes that the language pertaining to this requirement should be eliminated as it only increases an administrative burden without markedly increasing the effective enforcement of the proposed regulation.

Response:

We do not agree. The affirmative statement required of the consignee performs two functions. It provides the basis for taking sanctions against the consignee for a false statement under 18 U.S.C. 1001 and under 19 U.S.C. 1592, and it obviates the necessity for Customs officers to leaf through all of the documents in each consolidated shipment to ensure that no designations have been made. The suggestion, if adopted, would put importers essentially in the same position as now and create new administrative burdens for Customs.

CONCLUSION

After careful consideration of all the comments received and further review of the matter, it has been determined to republish the

proposal with the modifications noted and to allow interested persons an additional opportunity to submit comments on the proposal. Commenters on the original proposal need not resubmit their comments. They will be reconsidered along with any new comments received in response to this notice.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2324, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information requirements contained in § 141.11(c) are subject to the provisions of the Paperwork Reduction Act (44 U.S.C. 3501) and have been cleared by the Office of Management and Budget (OMB). Accordingly, Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and the control numbers assigned by OMB is being amended to include OMB control number 1515–0150.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LISTS OF SUBJECTS IN 19 CFR

Part 141

Customs duties and inspection, Imports, Brokers.

Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collection of information.

PROPOSED AMENDMENT

It is proposed to amend Parts 141 and 178, Customs Regulations (19 CFR Part 141, 178), as set forth below.

PART 141—ENTRY OF MERCHANDISE

1. The general authority citation for Part 141, Customs Regulations (19 CFR Part 141), would continue to read as set forth below:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 141.11 by adding a new paragraph (c) to read as follows:

§ 141.11 Evidence of right to make entry for importations by common carrier.

* * * * * * *

(c) *Consolidated shipments by common carrier.* (1) In the case of consolidated shipments by common carrier, entry shall not be made by a broker appointed by the consignee named in the master bill of lading or master air waybill if a consignee on any one of the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill, has designated on the individual bills of lading or individual air waybills another broker to make entry, or any one of the individual bills of lading or individual air waybills indicates that entry will be made by the actual owner or purchaser, or that entry is only to be made at a different port of entry.

(2) If entry is made by a broker appointed by the consignee named in the master bill of lading or master air waybill, the broker shall submit with the entry a signed statement to the effect that none of the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill have: (i) designated a broker or a different broker for the one identified in the master bill of lading or master air waybill; or (ii) indicated that entry will be made by the actual owner or purchaser or; (iii) specified that entry is to be made at a different port of entry. The required statement may be stamped, typed, or printed on the entry documentation provided to Customs. The signed statement shall not be treated as a missing document for which a bond may be provided (See § 141.66 of this Chapter). If the signed statement is not submitted, separate entry shall be made for each individual shipment in the consolidated shipment by the importers of record or their brokers, as appropriate. Shipments for which no entry is made will be placed in general order pursuant to § 4.37 of this Chapter, after the expiration of the lay order period.

(3) The procedures set forth in paragraphs (c)(1) and (c)(2) of this section are not applicable in any of the following situations:

(i) The express delivery, courier service, or similar delivery operation does not involve consolidated shipments; or

(ii) The express delivery, courier service, or similar delivery operation does not use individual house bills of lading or air waybills; or

(iii) The shipper has contractually agreed for a particular shipment that the carrier is the consignee and has the right to appoint a broker of its own choosing to make entry; or

(iv) The shipper has paid a fee which includes Customs entry and clearance in the U.S.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 would continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. It is proposed to amend § 178.2 by inserting the following in the appropriate numerical sequence according to the section number under the columns indicated:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	Description	OMB Control No.
§ 141.11(c)	Entry of consolidated shipments by common carrier	1515–0150

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: October 21, 1987.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 4, 1987 (52 FR 42310)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87-1159)

AMERICAN PERMAC, INC. AND BOEWE MASCHINENFABRIK, GMBH, BOEWE SYSTEMS & MACHINERY, INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE

Rufus E. Jarman, Jr., of Barnes, Richardson & Colburn, New York, New York, argued for appellants. Of counsel were *Karin M. Burke* and *Matthew J. Clark*.

Jack M. Simmons, III, of the United States International Trade Commission, Washington, D.C., argued for appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel, and *James A. Toupin*, Assistant General Counsel.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

(Decided October 15, 1987)

Before NIES, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and ARCHER, *Circuit Judge*.

SKELTON, *Senior Circuit Judge*.

This is an appeal by the plaintiffs from a decision of the United States Court of International Trade (the court) in *American Permac, Inc., Boewe et al.* v. *United States*, —— CIT ——, Slip Op. 86-120 (Nov. 13, 1986). The facts in the case as stated by the court are as follows.

Plaintiffs, a West German manufacturer of dry cleaning machinery and its American importer and distributor[1] ("Boewe et al."), brought this action challenging a final determination of the International Trade Commission ("ITC" or "Commission"). The determination arose from an administrative review conducted pursuant to § 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b) (1982).[2] The

[1] Plaintiffs are Boewe Maschinenfabrik GmbH (West German manufacturer/exporter); Boewe System & Machinery, Inc. (importer); and American Permac, Inc. (distributor/marketing representative).

[2] 19 U.S.C. § 1675(b) (1982) provides, in pertinent part:

(b) Reviews upon information or request.—
(1) In general.—Whenever * * * the Commission receives * * * a request for the review of * * * an affirmative determination made under section * * * 1673d(b) of this title, which shows changed circumstances sufficient to warrant a review of such a determination, it shall conduct such a review after publishing notice of the review in the Federal Register * * *.
(2) Limitation on period for review.—In the absence of good cause shown—
(A) the Commission may not review a determination under section * * * 1673d(b) of this title * * *
less than 24 months after the date of publication of notice of that determination or suspension.

ITC concluded that West German imports of dry cleaning machinery would materially injure the domestic industry if the antidumping duty order covering those imports were modified or revoked. *Drycleaning Machinery From the Federal Republic of Germany*, Inv. No. 751–TA–9 (Final), USITC Pub. 1617 (Dec. 1984). Plaintiffs filed a motion for judgment upon the agency record, pursuant to Rule 56.1 of the court, seeking reversal of the determination on the ground that it is not supported by substantial evidence on the agency record.

ITC Determination

In 1972, following an injury determination by the United States Tariff Commission (predecessor to the ITC), the Treasury Department issued an antidumping finding covering dry cleaning machinery imported from West Germany. T.D. 72–311, 37 Fed. Reg. 23715 (Nov. 8, 1972). That finding remained in effect on the effective date of the Trade Agreements Act of 1979, and thus became subject to the administrative review procedures set forth in 19 U.S.C. § 1675(b). *See Matsushita Electric Industrial Co., Ltd.* v. *United States*, 2 CIT 263, 529 F. Supp. 670 (1981). In May 1984, plaintiffs, Boewe et al., filed a request for such a review with the ITC. The Commission thereafter determined that changed circumstances existed sufficient to warrant a review investigation, and published notice of the investigation in the Federal Register on August 15, 1984 (49 Fed. Reg. 32692). The ITC review covered the dry cleaning machinery imports of two West German manufacturers, petitioner Boewe Maschinenfabrik GmbH ("Boewe"), and Seco Maschinenbau GmbH & Co. Kommanditgesellschaft ("Seco"). A public hearing was held on October 31, 1984. Plaintiffs were the only private parties to participate in the investigation or to appear at the hearing.[3]

Plaintiffs' presentation at the public hearing consisted primarily of testimony by Peter Boden, chairman of the plaintiff West German producer/exporter, and William A. Hayday, president of the plaintiff importing and marketing subsidiaries. Boden and Hayday indicated that Boewe's current pricing policy calculates prices for the same models which are uniform throughout the world and do not include dumping margins. They stated that removal of the dumping order would have no effect on Boewe's pricing structure. They also testified that limitations in Boewe's production capacity would prevent any short-term material increase in shipments to the United States market beyond current projections.

In its final determination, published in December, 1984, the Commission described its task as follows:

> As stated in *Television Receiving Sets From Japan* [Inv. No. 751–TA–2, USITC Pub. 1153 at 9 (1981)], Section 751(b) requires us—

[3] A representative of Vic Manufacturing Co., one of the domestic producers, appeared as a non-party participant and was permitted to testify.

> * * * to assess the inhibiting effect that the [outstanding antidumping] order has on the pricing, production, and marketing strategies of companies subject to it, to predict the effect of revocation on those strategies and on the market place, and then to determine whether those effects would result in material injury or threat thereof to the domestic industry.
>
> Section 751(b) evaluations assume that any dumping is being offset by the existing order and require us to forecast what will happen if the order is revoked or modified. The analysis starts from the legally required assumption that [less-than-fair-value] sales will continue or resume once the dumping order is removed, and consists of two steps: (1) forecasting the likely behavior of the foreign manufacturers and the importers in the event the antidumping order were revoked or modified; and (2) determining whether injury to a domestic industry would result from the modification or revocation of the antidumping order based on that forecast.

USITC Pub. 1617 at 4–6 (footnotes omitted).

The Commission first examined the effect of revocation of the antidumping order on West German producers and concluded, despite the contrary declarations of plaintiffs' witnesses, that revocation would affect the volume and price of West German imports. With respect to volume, the Commission found that Boewe had the intent and the capability to increase the volume of exports to the United States in the immediate future. Most Boewe machines currently exported to the United States are of its "flexible" (or "flex") models—so called because they can be modified to increase or decrease capacity—which Boewe developed specifically for the American market. The Commission noted that imports from West Germany have increased substantially beginning in 1983 (when Boewe introduced its "flex" line), and that Boewe's stated numerical goal for exports to the United States was significantly higher than present levels. With respect to pricing, the Commission found that some degree of price competition existed between West German and domestic machines, and that revocation of the antidumping order would permit greater price flexibility for West German imports. The Commission concluded that an increase in market penetration by West German imports would be aided by revocation of the antidumping order. The Commission noted, however, that its analysis was complicated by the fact that no final dumping margins had been calculated since 1974, and the only available preliminary margins from the International Trade Administration ("ITA") of the Commerce Department were issued in 1981 (covering entries between July 1979 and June 1980)[4] and thus antedated the introduction of Boewe's "flex" machines.

[4] The ITA's preliminary weighted average margin calculation for the Boewe imports covered by the first periodic review was 65.95 percent. 46 Fed. Reg. 60868. The ITA did not publish the final results of that review until January 10, 1985—about a month after the ITC published its final determination herein. The final margin calculation for the covered

Continued

The Commission then examined the domestic industry, which it found to be weak and vulnerable to dumped imports from West Germany. Because of their current low profitability, the Commission found it unlikely that domestic producers of dry cleaning machinery could reduce their prices to meet increased competition from West German imports stemming from revocation of the antidumping order. The Commission determined, therefore, that revocation of the antidumping order would materially injure the domestic industry.

The plaintiffs appealed to the Court of International Trade seeking reversal of the ITC's determination on the ground that it is unsupported by substantial evidence on the record.

The Decision of the Court of International Trade

The court thoroughly examined and analyzed the findings of the ITC to determine whether they were supported by substantial evidence, bearing in mind the limited standard of review, saying:

> The Federal Circuit has stressed that the judicial review of a Commission determination for substantial evidence is a "limited standard of review," *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 750 F.2d 927, 936 (Fed. Cir. 1984), and the limited parameters of that standard have been elucidated in numerous decisions. *E.g., Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1560 (Fed. Cir. 1984); *Phillip Bros. Inc.* v. *United States*, Slip Op. 86–74, 11 CIT —— (July 17, 1986); American Spring Wire Corp. v. United States, 8 CIT ——, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom., Armco Inc.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985).

The court noted that the ITC's findings set forth above and its further finding that revocation of the antidumping order would permit the plaintiffs greater price flexibility in fixing prices due to (1) the elimination of plaintiffs' current expenses resulting from the way the dumping order is presently being administered, and (2) the removal of any exposure to potential dumping duties. These circumstances would allow plaintiffs to lower their prices.

These findings led the ITC to conclude that material injury to United States industry would result from revocation of the antidumping order. The court held that this conclusion was reasonably based on the subsidiary findings of the ITC, which the court had reviewed and found to be supported by substantial evidence and in accordance with law. The court denied plaintiffs' motion for judg-

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Boewe imports was 30.05 percent. 50 Fed. Reg. 1256. *See American Permac, Inc.* v. *United States*, —— CIT ——, Slip Op. 86–83 (Aug. 12, 1986). It is clear from the record below that the Commission was aware of the approximate final margin calculations the ITA intended to publish.

On August 8, 1985, the ITA published the final results of the second periodic review. In that determination, the agency found weighted average margins of 17.23 percent for Boewe entries between July 1980 and October 1981, and 0.45 percent for Boewe entries thereafter through October 1982. 50 Fed. Reg. 32154. The ITA has since initiated periodic reviews covering Boewe entries from November 1982 through October 1984 (51 Fed. Reg. 5219), and from November 1984 through October 1985 (50 Fed. Reg. 50933). The preliminary margin determination for Boewe entries during the latter period is 1.87%. 51 Fed. Reg. 32676, 77 (September 15, 1986).

ment on the agency record and dismissed the action on November 13, 1986. The plaintiffs have appealed from that decision.

OPINION

In their appeal, the plaintiffs seek to overturn the decision of the court on the ground that it is not supported by substantial evidence. Since the decision of the court is based on the findings of the ITC, we must first determine whether the ITC's findings are supported by substantial evidence. We held in *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 750 F.2d 927 (Fed. Cir. 1984) that this was the correct procedure. There we said:

> There is no question but that under our jurisdictional statute it is the court's decision that is before us. 28 U.S.C. § 1295(a)(5). However, resolution of whether the court correctly held that the Commission's decision was not supported by substantial evidence requires consideration of the evidence presented to and the analysis by the Commission. Thus, to determine whether the court correctly applied the statutory standard of 19 U.S.C. § 1516a(b)(1) (B),[5] we must review the Commission's decision. *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1559 n. 10 (Fed. Cir. 1984); *Armstrong Bros. Tool Co.* v. *United States*, 626 F.2d 168, 169–70 (CCPA 1980).

750 F.2d at 932.

Matsushita was a case involving a review by the ITC of an injury determination, as here. There we stated:

> Further, we do not agree that a review investigation begins on a clean slate just as though it were an original investigation to determine whether an antidumping order should be put into effect. The applicable regulation, 19 C.F.R. § 207.45(a), correctly provides that in a review investigation the Commission must be persuaded that an existing order could be *modified* or *revoked* without material injury to the U.S. industry.

750 F.2d at 932.

We reaffirm this standard and apply it in the instant case.

The ITC began its investigation against the backdrop of the original antidumping order. However, its review was a completely new investigation to determine if the original order could be modified or revoked without material injury or threat of injury to United States industry. The determination that was required to be made by the ITC is described in Commission Rule 207.45(a), which provides in pertinent part as follows:

> (a) *Purpose.* * * * the Commission shall institute an investigation to determine * * * whether an industry in the United

[5] 19 U.S.C. § 1516a(b)(1)(B) provides:

> The court shall hold unlawful any determination, finding, or conclusion found—
>
> * * * * * * *
>
> (B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

The court is required by 28 U.S.C. § 2640(b) to apply that standard.

> States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by * * * the antidumping order if the order were to be modified or revoked * * *.

19 C.F.R. § 207.45 (1984).

In performing this duty, it may be said that the ITC conducts an inquiry that has two phases. *First*, it forecasts the likely behavior of the foreign exporters and the importers in the event the order is revoked or modified. In this regard it considers such factors as capacity utilization or supplies of the raw product, marketing network and strategy, conditions in the United States market, past behavior, the imports' share of the United States market, corporate planning, ability of the foreign producers to respond rapidly to shifts in United States demand, the stated intent of the foreign producers or the importers or both, and all relevant economic factors.

Since the principal focus of this phase of the investigation is on the future behavior of the foreign exporters and the importers, their intentions are very important. As the court said in *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 569 F. Supp. 853, 856–857, 6 C.I.T. 25, 28–29 (1983):

> The judgment of present intentions is a proper, and possibly controlling element of a [section 751] review by the ITC.

Second, the ITC considers the impact of the imports on the United States industry to determine whether they will cause material injury or threat of material injury to the domestic industry. Congress has listed the following factors that are to be considered and evaluated by the ITC in making this determination:

> (iii) Impact on affected industry.—In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—
>
> > (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> > (II) factors affecting domestic prices, and
> > (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

19 U.S.C. § 1677(7)(C)(iii) (1982).

For purposes of investigations under section 751(b), the ITC must assume that dumping will resume if the antidumping duty order is revoked or cancelled. In *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 569 F. Supp. 853, 856, 6 C.I.T. 25, 27 (1983), the court explained that this presumption [sic, assumption] is based on the bifurcated nature of the administration of the antidumping laws wherein the Department of Commerce, (acting through the Interna-

tional Trade Administration (ITA)), as the administering authority, makes a determination whether dumping is taking place and, if so, calculates the percentage of dumping margins. The ITC determines whether the dumping will cause injury or threat of injury to United States industry. Where both determinations are affirmative, the ITA issues an antidumping duty order. 19 U.S.C. § 1673d(c)(2). That is what happened in the instant case.[6]

With the foregoing principles in mind, we now proceed to analyze the findings of the ITC to determine whether its conclusions and decisions are supported by substantial evidence.

First. The ITC found that the plaintiffs intended to increase the imports of the dry cleaning machinery to the United States and that they had the capacity to do so. It found further that such imports would actually increase if the order was removed. As to the intent of the plaintiffs in this regard, the evidence shows that they admitted by the testimony of their executive officers that they intended to increase the imports into the United States regardless of whether the order was removed. This intention is also expressed repeatedly in plaintiffs' brief in this appeal. In addition to this direct evidence of plaintiffs' officers on intent, the ITC had before it circumstantial evidence showing such intent. For instance, the plaintiffs developed the "flex" machine to appeal to the United States market and to increase their sales in this country. Imports of that machine rose from 70 machines in 1982 to 242 in 1983. This was a new type machine with variable capacity that could expand as the needs of the dry cleaning establishment expanded. It was developed because an earlier line was ill-suited for the United States market, because, among other reasons, it was too highly engineered and costly. The flex machine was developed solely for sale in the United States. The plaintiffs admitted that they intended to get a larger share of the market in this country with it. The ITC considered the impact of this machine on the future volume of plaintiffs' imports.

Further evidence that the plaintiffs intended to maintain and increase their presence in the United States market was the fact that they were potentially liable for substantial antidumping duties for which they had posted bond, yet they continued to import despite this liability and associated costs.

Substantial evidence supports the conclusion of the ITC that imports from West Germany would increase if the order were removed.

Second. The ITC found that the revocation or modification of the order would permit greater price flexibility to the importers. The evidence showed that the plaintiffs intended to sell their new flex machines at a lower price than was obtained for the older line of

[6] 19 U.S.C. § 1675(b)(1) provides two alternate avenues plaintiffs could pursue for the removal or modification of the antidumping duty order. On the one hand, they could petition the ITC for this relief, as they have done in this case. On the other hand, they could request the Department of Commerce to eliminate its antidumping determination. *See American Lamb Co.* v. *United States*, 785 F.2d 994 (Fed. Cir. 1986); and *Al Tech Specialty Steel Corp.* v. *United States*, 745 F.2d 632 (Fed. Cir. 1984).

machines. This would make their new machines more price competitive in the domestic market where prices were already competitive. The removal of the order would save plaintiffs the expenses they now have in connection with the administration of the order, and would remove its exposure to potential dumping duties. They would no longer have to attend annual meetings with Commerce, post bonds and incur other administrative expenses. The ITC found that greater price flexibility for the plaintiffs upon revocation of the order would sharpen competition in the United States market.

Substantial evidence supports the finding of the ITC that revocation or modification of the order would afford greater price flexibility to the plaintiffs.

Third. The ITC found that the condition of the domestic industry was weak and vulnerable. This finding was based on extensive information gathered by the ITC for the period of 1981 through the first six months of 1984. This survey showed that although domestic consumption of dry cleaning machinery increased during this period, the domestic industry did not participate in it to any significant degree. Domestic production, related workers, and capacity utilization declined throughout this period. Hours and wages of workers declined. Net sales declined from 1981 to 1982 by 15 percent. Gross profit and operating income also declined.

There is substantial evidence supporting the conclusion of the ITC that the domestic industry was weak and vulnerable.

Finally, the ITC concluded that if the antidumping duty order were modified or revoked, the plaintiffs' imports of dry cleaning machinery would materially injure the domestic industry. This conclusion is supported by substantial evidence and is otherwise in accordance with law.

The decision of the Court of International Trade, sustaining the ITC's determination, is affirmed.

AFFIRMED

(Appeal No. 87–1166)

FISCHER & PORTER CO., INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, KROHNE MESSTECHNIK GMBH & CO., KG AND KROHNE AMERICA, INC., INTERVENOR

John M. Calimafde, Hopgood, Calimafde, Kalil, Blaustein & Judlowe, of New York, New York, argued for appellant. With him on the brief were *James M. Rhodes, Jr.* and *Dennis J. Mondolino.*

Jean Heck Jackson, Office of the General Counsel, U.S. International Trade Commission, Washington, D.C., argued for appellee ITC. With her on the brief were *Lyn M. Schlitt,* General Counsel, and *James A. Toupin,* Assistant General Counsel.

Tom Schaumberg, Howrey & Simon, of Washington, D.C., argued for intervenor Krohne Messtechnik. With him on the brief was *Robert S. Budoff*. Also on the brief were *Robert Cesari* and *Martin O'Donnell*, Cesari & McKenna, of Boston, Massachusetts.

Appealed from: U.S. International Trade Commission.

(Decided October 28, 1987)

Before MARKEY, *Chief Judge*, BALDWIN, *Senior Circuit Judge*, and NIES, *Circuit Judge*.

NIES, *Circuit Judge*.

Fischer & Porter Co., Inc. (F&P) appeals from the International Trade Commission's final determination in *In the Matter of Certain Unitary Electromagnetic Flowmeters*, Investigation No. 337-TA-230, U.S.I.T.C. Pub. 1924 (Nov. 17, 1986) (Comm'n op.), holding that the importation and sale of certain unitary, flangeless, electromagnetic flowmeters made in West Germany by Krohne Messtechnik GmbH & Co. KG and sold in the United States by Krohne America, Inc. (collectively, Krohne) did not violate section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (1982).[1] Although the Commission found that the subject imports infringed F&P's U.S. Patent No. 4,420,982 ('982) covering certain flowmeters, it found no effect or tendency to substantially injure a domestic industry as required for relief under section 337. Our jurisdiction over the appeal is found in 19 U.S.C. § 1337(c) (1982) and 28 U.S.C. § 1295(a)(6) (1982). We affirm the Commission's finding of no injury and, thus, its ultimate determination of no violation of section 337. The Commission's decision with respect to validity and infringement of the '982 patent is vacated.

I

Following proceedings on a section 337 complaint filed by F&P, an Administrative Law Judge (ALJ) in an initial decision ruled that there was an unfair trade practice in the importation and sale of certain unitary, electromagnetic flowmeters by Krohne by reason of infringement of claims 1 through 5 of F&P's '982 patent.[2] The ALJ also found that such unfair trade practice had the effect or tendency to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Accordingly, the ALJ de-

[1] 19 U.S.C. § 1337(a) provides:

> (a) ***Unfair methods of competition declared unlawful***
> Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the *effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States*, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

[Emphasis added.]

[2] Many industrial process applications use flowmeters to measure the flow rate of liquid through a pipe line. Electromagnetic flowmeters are especially adapted to measure the volumetric flow rates of fluids which present difficult handling problems, such as corrosive acids, sewage, and slurries.

termined that section 337 had been violated by the Krohne imports and that an exclusion order should be entered.

Krohne petitioned the Commission to review the ALJ's decision. The Commission chose to review only the issue of whether Krohne's infringing flowmeters had the effect, or tendency, to destroy or substantially injure a domestic industry and the majority of the Commission (two members dissenting) determined that F&P had not established such injury, rejecting the ALJ's contrary finding. 51 Fed. Reg. 40,270 (Oct. 30, 1986). Consequently, F&P obtained no relief under section 337 and appeals to this court for reinstatement of the ALJ's decision.

II

F&P set forth the issue on appeal as whether the majority decision of the Commission was arbitrary, capricious, or otherwise not in accordance with law "when it reversed the ALJ." It argues that the ALJ's findings are unassailable under Fed. R. Civ. P. 52, that a jury could have found as did the ALJ, and that such a verdict would have survived a JNOV motion.

Throughout its briefs, F&P misdirects the focus of the appellate inquiry in disregard of the precedent of this court. In *Corning Glass Works* v. *United States International Trade Commission*, 799 F.2d 1559, 230 USPQ 822 (Fed. Cir. 1986), this court undertook to set out in detail the appellate function in connection with appeals from the International Trade Commission and, particularly, in reviewing an injury determination. *Id.* at 564–68, 230 USPQ at 825–28. Contrary to F&P's understanding, we do not "review" the correctness of the ALJ's initial decision or the correctness of the Commission's "reversal" under Rule 52 or otherwise. The statute, 19 U.S.C. § 1337(c), directs that on appeal to this court, this court must review the "final determination of the Commission * * * in accordance with chapter 7 of title 5 [i.e., the Administrative Procedure Act (APA)]." The ALJ's decision is, of course, part of the record and will be accorded "such probative force as it intrinsically commands." *Universal Camera Corp.* v.*NLRB*, 340 U.S. 474, 495 (1951); *see also SSIH Equip. S.A.* v. *United States Int'l Trade Comm'n*, 718 F.2d 365, 382, 218 USPQ 678, 692 (Fed. Cir. 1983) (Nies, J., additional views). However, the issue before us is whether the "no injury" finding of the majority is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or unsupported by substantial evidence. 5 U.S.C. § 706 (1982). That the contrary determination of the ALJ and the dissenting members of the Commission would be sustained if it were the decision under review does not mean that the majority's determination *must* be overturned. Both decisions may be reasonable based on the entirety of the record, a concept some litigants find difficult to accept. In sum, this court may not substitute its judgment for the Commission's final determination on the ground that the court believes the ALJ's and the minority's view is "more reasona-

ble" than the majority's view. Such an appellate evaluation is patently not a basis for reversal under 5 U.S.C. § 706.

III

COMMISSION'S INJURY ANALYSIS

The Commission's analysis of the issue of injury begins with the correct statements of law that the section 337 requirement for injury to a domestic industry does not automatically follow from proof of infringement of an intellectual property right, citing *Corning Glass*, 799 F.2d at 1566, 230 USPQ at 826–27; *Textron, Inc.* v. *United States International Trade Commission*, 753 F.2d 1019, 1028, 224 USPQ 625, 631 (Fed. Cir. 1985); [*accord Akzo N.V.* v. *United States International Trade Commission*, 808 F.2d 1471, 1486, 1 USPQ2d 1241, 1250 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 2490 (1987)]; the holder of an intellectual property right has a smaller quantum of proof of injury than would be required in a nonintellectual property-based case, *Textron*, 753 F.2d at 1029, 224 USPQ at 632; *Bally/Midway Mfg.* v. *United States Int'l Trade Comm'n*, 714 F.2d 1117, 1124, 219 USPQ 97, 102 (Fed. Cir. 1983); the determination of injury to an industry is the type of question particularly within the expertise of the Commission, *Corning Glass*, 799 F.2d at 1568, 230 USPQ at 828; a determination of injury is dependent on the facts of the particular case, and, thus, not controlled by precedent, *id.*; and, finally, because the relevant market in the instant investigation contains noninfringing substitutes, it could not be assumed that sales by Krohne would have been made by F&P; rather F&P had to prove a causal connection between infringing imports and lost sales.

Reviewing the evidence, the Commission found that F&P did not carry its burden of proof that Krohne's infringement caused significant injury to F&P or a tendency to injure. The Commission summarized the substance of its findings as follows:

> Complainant [F&P] has not provided the Commission with specific domestic industry data, despite the fact that such data is within its control, and complainant does not explain why presenting the data in usable form to the Commission would impose any more of a hardship on it than it would on any complainant with a diverse product line. In addition, no shift of market share from complainant has been established in this investigation. Respondents [Krohne] were not found to be underselling. There were few lost sales established, and it is impossible to determine from the record whether those sales are significant. While excess domestic capacity has been established, that finding alone cannot support a determination of substantial injury.

Comm'n op. at 21.

IV

EFFECT TO SUBSTANTIALLY INJURE

To establish an effect to substantially injure the domestic industry, F&P sought to prove that F&P's sales and profits of flowmeters within the scope of the domestic industry increased from 1982 to 1984 and declined in 1985, while the value of its inventory unfavorably rose in 1985; that Krohne's market share increased during the period; and that F&P lost sales to Krohne in an amount which represented a significant percentage of F&P's market. The Commission rejected each of these contentions for failure of proof. F&P argues that the failure of proof results from the Commission (1) improperly discounting, as lacking credibility, the testimony of F&P's sales manager with respect to F&P's sales volume of the patented flowmeters; and (2) improperly rejecting a 1983 business report (the Frost & Sullivan report) used as a basis for estimating a shift to Krohne of market share. In this connection, F&P asserts that the Commission failed to follow the precedent of this court in *Textron*, which held that a "lesser quantum" of proof of injury is required when unfair acts are based on infringement of intellectual property rights. We address each of these arguments in turn.

A

F&P manufactures two product lines of flangeless, magnetic flowmeters under the '982 patent, the MINI-MAG and K-MAG. These lines of flowmeters are made with flow tubes ranging in size from 1/10″—4″ in diameter, and F&P had originally asserted that all sizes were within the patent's scope. Prior to the evidentiary hearing, however, F&P stipulated that only its MINI-MAG and K-MAG flowmeters with flow tubes of diameters greater than two inches were made in accordance with the '982 patent, and, thus, defined the "domestic industry." Despite the stipulation, F&P submitted proof of sales, profitability, and inventory for its total MINI-MAG and K-MAG product lines for the years 1982-1985. These data show that F&P's dollar and unit sales of, and profits from, all sizes of MINI-MAG and K-MAG flowmeters increased from 1982 to 1984 and decreased in 1985, while the value of year-end inventory increased from 1984 to 1985.

None of F&P's data was specific to the "domestic industry," i.e., MINI-MAG and K-MAG meters with 2″—4″ diameter flow tubes. F&P relies on the following testimony of its sales manager, Mr. Dimm, to convert the unit and dollar figures for all sizes to unit and dollar figures for the 2″—4″ models:

> Q Mr. Dimm, do you know what the approximate percent of your unit sales are made of MINI-MAGs and K-MAGs that are two inches or greater in diameter?
> A Of just the MINI-MAG type products?
> Q Yes.

A Larger than two inch?
Q Two inches and up.
A I don't know an exact figure, but I would estimate that approximately 60 percent.
Q Would the same number hold for K-MAG?
A I couldn't say for K-MAG at this point in time. We have had it in the market only since early 1985.

Applying Dimm's sixty percent estimate across the board to all of its total dollar and unit figures, F&P "constructed data" for the 2″—4″ meters for the 1982–1985 time period. Not surprisingly, sixty percent of each year's total figures shows the same dollar and unit trend in sales, the same 1985 downward turn in sales and profits, and the same increased value of inventory in 1985 for 2″—4″ units as for all units.

Having reviewed the entirety of its opinion, we can find nothing suggesting that the Commission made an adverse credibility determination with respect to the Dimm testimony. Specifically, the Commission stated:

> We find that the record does not support the assumption that trends in the domestic industry and F&P's entire product line are identical. Moreover, because F&P's estimate of sales of the patented product concerned *unit* sales, we find that F&P's estimate cannot be used to construct valid domestic industry data from total product line data provided by F&P in *dollar* amounts.

Comm'n op. at 9 (emphasis in original). F&P points to no evidence specifically directed to the trend in the sales of 2″—4″ devices so that it would be appropriate to apply sixty percent across the board. Nor does the record contain any evidence that sixty percent of units translates to sixty percent of dollar sales. Indeed, the evidence on price differentials with respect to sizes would lead to the conclusion that it does not.

We conclude that F&P's argument that the Commission rejected Dimm's testimony as lacking credibility is without foundation. The Commission accepted Dimm's testimony, but not the extrapolations therefrom that sixty percent was applicable to *each* year and that sixty percent of total sales dollars and profits represented sales and profits attributable to the patented products.

In addition, the Commission found that F&P had the data on sales figures for the patented products and, thus, F&P could not assert that it was impossible to present better information. The Commission stated:

> [We] note[ ] that complainant [F&P] has expressed little interest in remedying the deficiencies of its domestic industry data. In its notice of review the Commission asked the parties to address the issue of whether a remand to the ALJ to take additional evidence would be helpful in concluding this investigation. 51 Fed. Reg. 33933, September 24, 1986. Complainant did

> not respond that such a remand would be helpful. Complainant reiterated in its brief on review that it does not keep its business records segregated by unit size and that it is not required to provide the Commission with such segregated data.

Comm'n op. at ll. Although F&P could have supplied the domestic industry data in its possession, it refused to do so even when given a second chance by the Commission. Thus, F&P's assertion that the Commission's finding of no injury turned on an improper credibility determination is rejected.

B

To show a shift in market share in the relevant market, which comprises the "domestic industry" and competitive devices, F&P relied on data from the Frost & Sullivan report on the flowmeter industry. That data indicated F&P's share of the United States market in *magnetic* flowmeters, flanged and flangeless, for the year 1983. F&P then attributes this 1983 market share to the years 1984–85, relying on the assumption that its market share remained constant and disregarding any impact the '982 patent (issued on December 20, 1983 and not reflected in the 1983 data) might have on market share. Moreover, F&P uses the report's data to fix its market share in the relevant market. The report's data were not broken down, however, with respect to flowmeter sizes or flangeless models, and did not include non-magnetic flowmeters which are competitive with F&P's patented devices. To determine its market share in the relevant market, F&P thus further assumes that the report's market share figure, covering magnetic, flanged, and flangeless flowmeters, fixes F&P's market share in both the domestic industry, which includes only magnetic, flangeless, 2″—4″ flowmeters, and the relevant market, which comprises the domestic industry and competitive devices.

With its share of the relevant market in hand, F&P turns to calculating the total relevant market and Krohne's share of that market during the relevant years, as required to show a shift in market share. F&P provided data for its own unit sales of magnetic, flangeless meters—of all sizes—and applied the Dimm estimate to that data to obtain F&P's unit sales of magnetic, flangeless, 2″—4″ flowmeters (the domestic industry). Dimm's estimate was an indefinite approximation and referred only to the MINI–MAG, not the K–MAG, product. Nevertheless, by dividing F&P's unit sales of magnetic, flangeless, 2″—4″ flowmeters by F&P's previously determined market share, F&P calculated the total unit sales in the domestic industry. F&P then assumed that the total unit sales in the relevant market was the same figure.

F&P was now able to calculate Krohne's market share. Krohne provided unit sales data for magnetic, flangeless, 2″—4″ flowmeters. Krohne's share of the relevant market is then simply the unit sales figure provided by Krohne divided by the total unit sales in

the relevant market. Thus, by a comparison of F&P's and Krohne's market shares over the relevant time period, a shift appears in their respective market shares in the relevant market.

The Commission rejected this "proof" of a shift. However, this came not from a rejection of the Frost & Sullivan report as evidence, but from a refusal to make the assumptions which had to be made to show a shift in market share of the relevant market. In view of the assumption upon assumption apparent in F&P's analysis, the Commission's finding that the record does not support a finding of a shift in market share from F&P to Krohne must stand.

C

F&P argues that, even without the Frost & Sullivan report, it proved injury in that Krohne's sales are "significant" because they amount to a large figure over a four-year period. However, out of that number, F&P established that it actually lost only three sales. The Commission found that it could not determine if that loss was significant without data on the relevant market. As this court held in *Corning Glass*, 799 F.2d at 1569, 230 USPQ at 828, the significance of sales cannot be determined in a vacuum. Thus, the extrapolations built from the Frost & Sullivan report were necessary but were no more acceptable in this connection than to show a shift in market share.

D

To overcome the above defects in its evidence, F&P attempts to invoke the ruling in the *Textron* decision that a lesser "quantum of proof" of injury is required in a patent infringement investigation than in other situations. 753 F.2d at 1029, 224 USPQ at 632. F&P urges that, contrary to *Textron*, the Commission imposed an unreasonably high burden of proof when it rejected the constructed data based on the 1983 Frost & Sullivan report and the Dimm testimony.

F&P's reliance on *Textron* is misplaced. The *Textron* decision spoke of "quantum of proof" in the sense that fewer incidents of lost sales might be sufficient to establish injury. The ruling was not directed to lessening the quality and quantum of evidence necessary to establish the *facts* on which the injury determination is based. The quality and quantum of evidence necessary to establish the facts is fixed by statute.

Under 5 U.S.C. § 556(d), F&P had the burden of proof of injury as "the proponent of * * * [an] order." That section further precludes the Commission from issuing an order unless "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d) (1982). The phrase "in accordance with * * * substantial evidence" in section 556(d) is distinctly different from the "unsupported by substantial evidence" standard which this appellate court must apply in this appeal. 5 U.S.C. § 706 (2)(E) (1982). In the landmark case of *Steadman* v. *Securities & Exchange Commis-*

sion, 450 U.S. 91, 99–100, *reh'g denied*, 451 U.S. 933 (1981), the Supreme Court discussed the difference as follows:

> [T]he adjudicating agency must weigh the evidence and decide, based on the weight of the evidence, whether a disciplinary order should be issued. The language of § 7(c), therefore, requires that the agency decision must be "in accordance with" the weight of the evidence, not simply supported by enough evidence " 'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966), quoting *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of error. See *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). Section 10(e), by contrast, does not permit the reviewing court to weigh the evidence, but only to determine that there is in the record " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' " *Consolo* v. *FMC*, supra, at 620, quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). It is not surprising, therefore, in view of the entirely different purposes of § 7(c) and § 10(e), that Congress intended the words "substantial evidence" to have different meanings in context.

The Court further held that in enacting section 556(d) Congress was primarily attempting to eliminate agency decisionmaking premised on evidence of poor quality (irrelevant, immaterial, unreliable, and nonprobative) and of insufficient quantity (not substantial, i.e., not a preponderance). *Id.* at 102.

Textron could not and did not change the burden of proof of facts under section 556(d) established in *Steadman*. Thus, F&P was required to support its assertion of injury with evidence of good quality and sufficient quantity to amount to a preponderance. The Commission simply found its evidence not sufficiently probative. Contrary to F&P's argument, nothing said by the Commission indicates that the Commission was looking for mathematical precision. Under section 556(d), however, the Commission could not rely on unsupported assumptions, speculations, and extrapolations. Nor could it place the burden on Krohne to disprove injury to F&P by compiling the actual data from F&P's invoices. The burden was on F&P to prove injury. F&P had the data and it is no excuse for its failure to put it in usable form that it would have been an expensive undertaking.

Accordingly, we reject F&P's arguments that the Commission departed from the holding of this court in *Textron* with respect to the quantum of proof.

V

TENDENCY TO SUBSTANTIALLY INJURE

We have considered F&P's analysis on the tendency to substantially injure and are not persuaded of error in the Commission's contrary finding. F&P argues that "if U.S. demand increased, Krohne would likely increase its exports to the U.S." The Commission, in finding no proof of a tendency to substantially injure, noted, *inter alia*, that there is no evidence of record that foreign markets are saturated or that the U.S. market is being targeted. Comm'n op. at 22–23. F&P argues that circumstances other than foreign *market* saturation or U.S. market targeting can reasonably lead to a finding of a tendency to substantially injure. We agree, but "mere suspicions" that something will occur are not enough under 5 U.S.C. § 556(d). *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

VI

Having considered all of F&P's arguments, we see no basis to overturn the Commissioner's finding of no effect or tendency to substantially injure. Accordingly, the final determination of the Commission that F&P failed to establish a violation of 19 U.S.C. § 1337 is affirmed. The patent issues being mooted by affirmance on that ground, we vacate the portion of the Commission's decision concerning the patent issues.

AFFIRMED IN PART; VACATED IN PART

(Appeal No. 87–1209)

E.C. MCAFEE A/C BRISTOL METAL INDUSTRIES OF CANADA LTD., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Michael P. Maxwell, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

James Caffentzis, Fitch, King & Caffentzis, of New York, New York, argued for plaintiff-appellee.

Appealed from: U.S. Court of International Trade.
Judge RAO.

(Decided October 23, 1987)

Before NIES, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

NIES, *Circuit Judge.*

The United States appeals from a final order of the United States Court of International Trade in *McAfee* v. *United States*, 650 F. Supp. 1026 (CIT 1986), which ordered the government to refund custom duties to "E.C. McAfee a/c Bristol Metal Industries of Canada, Ltd." in the amount of $43,438.56 plus appropriate interest. The government challenges the trial court's jurisdiction to issue the order and its refusal to allow the government to offset the amount of the refunds against duties owed by the customhouse broker, E.C. McAfee, which were not for the account of Bristol Metal. We affirm.

I

This action arises from importations of aluminum grindings. Entry documents submitted to Customs for such merchandise identified the "importer of record" as "E.C. McAfee for the account of Bristol Metals Ltd." McAfee was the customhouse broker for the aluminum imports of the importer, Bristol Metal Industries of Canada, Ltd. Customs classified the merchandise as "articles" of aluminum under item 657.40, Tariff Schedules of the United States (TSUS), and assessed duties, which were paid, in the amount of $43,438.56. Bristol Metal retained counsel to protest the classification on the ground that Customs should have classified the aluminum as duty-free "scrap" under item 870.60, TSUS. Customs denied the protest, and an action was filed in the Court of International Trade, styled "E.C. McAfee (A/C Bristol Metal Industries of Canada Ltd.)," hereinafter "McAfee A/C Bristol."

Before trial, the parties settled, with the government accepting plaintiff's position. The trial court then entered a judgment in favor of "McAfee A/C Bristol," and ordered Customs to reliquidate the entries under the duty-free provision. In compliance with that order, Customs reliquidated the entries. Customs did not, however, pay over the amount of the refunds which resulted from reliquidations. Rather, it claimed a right under customs regulations to offset that amount against outstanding bills issued to McAfee on entries made by McAfee on behalf of persons other than Bristol. The attorneys of record in the suit demanded payment unless the outstanding debt was that of "McAfee A/C Bristol." Upon the government's refusal to pay, counsel filed a motion in the trial court in the name of the importer, Bristol Metal, for an order requiring the government to pay over the refunds plus interest.

The trial court held that it had jurisdiction to rule on the motion, stating the issue to be "whether [the] refund is available for set-off by Customs for monies owed to it by McAfee, the customhouse broker, on transactions other than Bristol's." 650 F. Supp. at 1028. Applying the general principle that one may not set off an agent's own obligation against a debt one owed to the principal (F. Mechem, *A Treatise on the Law of Agency* §§ 2491–92 (2d ed. 1914)), the court granted Bristol's motion and ordered the government to refund the

amount of the judgment to the plaintiff, "E.C. McAfee A/C Bristol Metal Industries of Canada, Ltd."

II

A. Jurisdiction

The government asserts that the trial court lacked jurisdiction over Bristol's motion on two theories. One theory is that Bristol lacked standing to file the motion because it is not a party to the action. The government urged that the motion is one to amend the judgment, in effect, to make Bristol the plaintiff. As such a motion, it was filed too late. Court of International Trade Rule 59(e) (thirty days to file motion to amend or alter judgment). We reject this argument.

The relief granted by the trial court was to the precise entity named as plaintiff throughout the proceedings, "McAfee A/C Bristol." Whether the motion was brought in the name of "Bristol" or "McAfee A/C Bristol" is of no substantive consequence here inasmuch as the relief was given to the named plaintiff. If there is a question that Bristol could not itself file the motion, it is purely technical. At most, the name on the *motion* needed to be changed, not the party which was afforded relief in the original judgment. Thus, the motion was not one to amend the *judgment* and was not untimely.

As a second theory contesting jurisdiction, the government asserts that because Bristol personally filed the motion, the motion must be considered a contractual claim for breach of the settlement agreement, and that the trial court lacks jurisdiction over such a claim. The preceding analysis also negates that theory. The motion was not a claim for breach of contract by Bristol, but one to enforce the court's original judgment in favor of "McAfee A/C Bristol." Thus, the government's jurisdictional theories fail.

B. Merits

With respect to the merits of Bristol's motion, the government argues that the trial court ignored the following regulation under which it was required to set off the refund against duties owed by McAfee:

> **§ 24.72 Claims; set-off.**
>
> When an importer of record or other party has a judgment or other claim allowed by legal authority against the United States, and he is indebted to the United States, either as principal or surety, for an amount which is legally fixed and undisputed, the district director shall set off so much of the judgment or other claim as will equal the amount of the debt due the Government.

19 C.F.R. § 24.72 (1987). Thus, the government asserts that we are faced with the legal issue of interpretation of the regulation. In contrast, appellee argues that we may not overturn the trial court's de-

cision not to allow the setoff unless the trial court "abused its discretion." The latter argument is easy to dispose of and we address it first.

It is correct that in some instances a court may disallow a setoff as a matter of discretion. However, a necessary predicate to any setoff is that cross-obligations exist between the parties. *See, e.g., Fuller* v. *Fasig-Tipton Co.*, 587 F.2d 103, 106 (2d Cir. 1978). Only then might the court determine, as a matter of discretion, not to allow the setoff. *Cf. Melamed* v. *Lake County Nat'l Bank*, 727 F.2d 1399, 1404 (6th Cir. 1984) (allowance of setoff in bankruptcy proceeding within trial court's discretion); *see also In re Diplomat Elec., Inc.*, 499 F.2d 342, 346 (5th Cir. 1974).

The trial court here ordered that refunds are to be made payable to "McAfee A/C Bristol," and, if there was no debt owed by Bristol, there could be no setoff. The court did not deny a setoff to the government as a matter of discretion. Thus, contrary to appellee's argument, our review of the issue on appeal is not under the abuse of discretion standard.

Appellee also asserts the trial court correctly concluded that the setoff regulation would not apply because the party entitled to the refund was not indebted to the government. We agree.

The regulation relied on by the government provides that a judgment in favor of an importer of record or other party may be set off against "the debt due" the government. Further, "the debt due" which may be satisfied by setoff must be an indebtedness of the importer of record or other party who received the favorable judgment. In this case, the judgment is in favor of "McAfee A/C Bristol." The government seeks to set that judgment off against any debt due from "McAfee A/C another." The government asserts no debt due from "McAfee A/C Bristol" or from "Bristol." Thus, there is, on this record, no cross-obligation due the government from either the denominated "importer of record" or "other party" which prevailed in the litigation and, thus, no legal basis for setoff under the regulation.

The government asserts that the decision in this case poses serious problems in the administration of the customs laws and in the collection of revenues. No doubt the decision affects the government's ability to collect on debts by offset. In the absence of reciprocal obligations, however, that manner of collection is not countenanced in the law. While an importer assumes the ordinary risks of a principal in dealing through his agent/broker, *see United States* v. *Federal Ins. Co.*, 805 F.2d 1012, 1019 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 2179 (1987), we are unpersuaded that the setoff regulation may impose on the importer the risk of the broker's nonpayment of du-

ties on other accounts when the government is aware of their relationship.* In any event, we reject such an interpretation.

The government construes the holding here as a broad determination that a refund accrues to and must be paid to the principal in a transaction, not the broker/agent. It then sees chaos in administration of the customs laws because it must determine for whom brokers are acting before paying out a refund. It also asserts that the decision conflicts with *United States* v. *Wedemann & Godknecht, Inc.*, 515 F.2d 1145 (CCPA 1975) or *Eurasia Import Co.* v. *United States*, 31 CCPA 202 (1944). We cannot agree. Our decision does not affect who is to be held liable for duties, who is responsible for record keeping, or to whom refunds are to be paid. The sole issue here is setoff. If the government seeks to utilize a judgment as a setoff, it must identify an existing debt due to the government from a winning party in accordance with agency principles applicable to setoff.

III

For the foregoing reasons, the final order of the Court of International Trade is affirmed.

AFFIRMED

(Appeal No. 87-1213)

A.N. DERINGER, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

James W. Hellwege, Law Office of Robert J. Koch, of Alexandria, Virginia, argued for appellant.

James A. Curley, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Lieberman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

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*The government at all times knew that the importer of record was McAfee for the account of Bristol and that Bristol was the real party in interest. The entry certificate indicates that McAfee is the broker for the account of Bristol. The named plaintiff in the case is "E.C. McAfee a/c Bristol Metal Industries of Canada Ltd." In its answer to the complaint, the government denied an allegation of the complaint that E.C. McAfee was the importer of record and insisted that the importer of record was "E.C. McAfee a/c Bristol Metals, Ltd." We note that an answer to a complaint constitutes an admission. *See, e.g., Darling Shops, Inc.* v. *Brack*, 95 F.2d 135, 141 (8th Cir. 1938) (answer is an admission even if not offered in evidence as trial, citing cases); 4 J. Wigmore, *Evidence* § 1064, at 67 (Chadbourn rev. 1972) (pleadings are judicial admissions and a party may invoke the language of the opponent's pleading to render the facts contained therein indisputable); *cf.* Fed. R. Civ. P. 8(d). Thus, the government cannot contend that it was unaware of the parties' relationship.

(Decided October 30, 1987)

Before FRIEDMAN and DAVIS, *Circuit Judges, and* COWEN, *Senior Circuit Judge.*

PER CURIAM.

This is a customs classification case in which the Court of International Trade decided for the Customs Service. The articles are reverse osmosis maple sap concentrators, and the question is whether they are filtering and purifying machines for liquids as classified under item 661.95, Tariff Schedules of the United States (TSUS) dutiable at 4.9% *ad valorem*, or whether they can enter duty-free as sugar-making machinery (or parts thereof) under item 666.20, TSUS or alternatively as agricultural or horticultural implements not specially provided for under item 666.00, TSUS.[1]

The trial court permissibly found on the record that the reverse osmosis maple sap concentrators are designed and marketed specifically for use by maple sap producers to decrease the time required to remove water from the raw maple sap. The water is removed by reverse osmosis under which the raw sap, which is clear and has the consistency of water, contacts under pressure a reverse osmosis membrane. A major portion of the water in the sap passes through the membrane and is recovered as a "permeate" stream, while the sap that cannot pass through is collected as a "concentrate" stream. The concentrate is further "dewatered" by the process of evaporation in a conventional maple sap evaporator which utilizes heat. Only after the application of heat is the resulting sap suitable for sale and consumption as maple syrup.

On the facts the court properly found that the merchandise performs a purifying and a filtering function—purifying in that it frees the sap from the extraneous matter, i.e., the excess water, and filtering in that the process involves the passage of an impure material over a porous surface, i.e., the membrane into which the raw maple syrup sap containing excess water is forced under pressure. Item 661.95, TSUS, thus applies directly because the merchandise both filters and purifies liquids.

In answer to appellant's point that the merchandise is one properly classified under item 666.20, TSUS, or item 666.00, TSUS (*see* footnote 1, *supra*), the court invoked headnote 1 of Subpart A of Schedule 6, Part 4—of which part item 661.95, TSUS, is a component—which provides that "[a] machine or appliance which is described in this subpart and also is described elsewhere in this subpart is classifiable in this subpart." Since both item 666.20 and item 660.00 are in Subpart C of Schedule 6, Part 4—thus described "elsewhere in this part"—and the court had correctly found that item 661.95 applied directly to this merchandise, it is plain that headnote 1 governs by its very terms, even though the devices involved

[1] On this appeal, appellant abandons its alternative claim for classification under item 666.20, TSUS.

are also described by the other items. *United States* v. *DeLaval Separator Co.*, 569 F.2d 1134, 1136–37 (CCPA 1978); *American Customs Brokg. Co.* v. *United States*, 433 F.2d 1340, 1341 (CCPA 1970). Headnote 1 thus governs the classification.

The Court of International Trade was correct, and its decision is

AFFIRMED

(Appeal No. 87-1301)

DRI INDUSTRIES, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDENT-APPELLEE

Peter Jay Baskin, Sharretts, Paley, Carter & Blauvelt, of New York, New York, argued for plaintiff-appellant.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

(Decided October 28, 1987)

Before NIES, BISSELL and ARCHER, *Circuit Judges.*

ARCHER, *Circuit Judge.*

DRI Industries, Inc. (DRI) appeals from the judgment of the United States Court of International Trade in *DRI Industries, Inc.* v. *United States*, 657 F. Supp. 528 (CIT 1987) (Carman, J.), sustaining the classification by the United States Customs Service of the tool chest portions of "Tool Lockers" (i.e., tool chests and cabinets) imported by DRI as "luggage" under item 706.62 of the Tariff Schedules of the United States (1983) (TSUS). We affirm.

The classification of DRI's tool chests as luggage depends on whether they are encompassed within the definition set forth in TSUS Schedule 7, Part 1, Subpart D, headnote 2(a)(ii), which reads:

> 2. For the purposes of the tariff schedules—
>
> (a) the term "*luggage*" covers—
>
> * * * * * * *
>
> (ii) brief cases, portfolios, school bags, photographic equipment bags, golf bags, camera cases, binocular cases, gun cases, occupational luggage cases (physicians', sample, etc.), and like containers and cases

> designed to be carried with the person, except handbags as defined herein.

One of the findings of the trial court, which is not contested, was that the tool chests are " 'designed to be carried with the person' from place to place or job to job, around or outside the home." 657 F. Supp. at 533. The trial court also determined that DRI's tool chests had characteristics in common with the enumerated articles in headnote 2(a)(ii) and were properly classified with them under the *ejusdem generis* rule of statutory construction.

DRI challenges the court's determination on two grounds. First, it argues that "use in connection with travel was *the* one common, essential characteristic of *all* the exemplars listed in headnote 2(a)(ii)" and, second, it contends that "[t]he trial court erred as a matter of law by not holding that headnote 2(a)(ii), *supra*, excludes articles which were primarily designed for a purpose other than that of being carried with a person from one place to another location."

With respect to DRI's first argument the trial court's opinion pointed out that headnote 2(a)(i) has the qualifying word "travel" in its provisions, but that this word is entirely missing in headnote 2(a)(ii). For the reasons stated by the court, it correctly determined that a "travel requirement" was not intended by Congress for articles covered by headnote 2(a)(ii).

DRI's second argument is similarly unconvincing. We agree with the trial court that there is no primary design requirement in headnote 2(a)(ii) and that portability of the tool chests is not the only design factor to be examined. The trial court did not err in determining that the tool chests had "characteristics in common with the enumerated articles." 657 F. Supp. at 533.

Accordingly, the judgment of the Court of International Trade is affirmed on the basis of its opinion.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 87–112)

GILMORE STEEL CORP., OREGON STEEL MILLS DIV., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND POHANG IRON AND STEEL CO., LTD., INTERVENOR

Court No. 86–05–00606

Before TSOUCALAS, *Judge.*

[Commerce's final determination to revoke the antidumping order reversed and action remanded.]

(Decided October 6, 1987)

Heller, Ehrman, White & McAuliffe (John H. Cutler, Rene P. Tatro and *Eric J. Sinrod)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeanne E. Davidson)* for the defendant; *Lisa Koteen,* Attorney Advisor, Department of Commerce, of counsel.

Mudge Rose Guthrie Alexander & Ferdon (N. David Palmeter, Donald B. Cameron, Jr. and *Julie C. Mendoza)* for the intervenor.

OPINION

TSOUCALAS, *Judge:* This action is before the Court, pursuant to USCIT R. 56.1, on cross-motions for judgment on an agency record. It raises a question of first impression regarding the Commerce Department's authority to revoke an outstanding antidumping duty order.

BACKGROUND

On August 22, 1984, the International Trade Administration of the Department of Commerce (hereinafter "ITA" or "Commerce") issued an antidumping order covering steel plate from the Republic of Korea. 49 Fed. Reg. 33,298 (1984). Thereafter, on May 8, 1985, the governments of the United States and Korea entered into a voluntary restraint arrangement ("VRA") covering steel plate as well as other steel products. In return for quantitative restrictions on im-

ports, the VRA contemplated that existing antidumping or countervailing duty orders on covered products be terminated.[1]

After receiving "model letters" supplied by Commerce, a majority of U.S. steel producers wrote to the agency expressing their desire that the antidumping order at issue here be revoked.[2] Based upon the lack of interest of the domestic industry, Commerce proceeded to publish notice of its intention to review the order, pursuant to § 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), and its tentative determination to revoke. 50 Fed. Reg. 50,648 (1985). Following a hearing, Commerce terminated a previously commenced administrative review[3] of the antidumping order and issued final notice of revocation. 51 Fed. Reg. 13,042 (1986). At all times, plaintiff, Gilmore Steel Corp. ("Gilmore"), has opposed revocation of the order.

ISSUE

The issue presented is whether Commerce, over the opposition of the petitioner in the underlying antidumping investigation, may properly revoke an antidumping duty order solely on the basis of the expression of a lack of support by a majority of the domestic industry.

DISCUSSION

The antidumping law, in relevant part, provides that Commerce:

> may revoke, in whole or part, a countervailing duty order or an antidumping duty order, or terminate a suspended investigation, after review under this section.

Tariff Act of 1930, § 751(c), 19 U.S.C. § 1675(c) (1982 & Supp. III 1985). The Court in *Manufacturas Industriales de Nogales, S.A.* v. *United States*, 11 CIT ——, Slip Op. 87–87 (July 24, 1987) has commented: "[s]elf-evidently, this provision permits the ITA to revoke an order once it has completed a review in accordance with subsection (a) of section 1675." *Id.* at ——, Slip. Op. 87–87 at 3 (citing *Mat-*

---

[1] The VRA provides in part that:

> 2. *Condition—Withdrawal of petitions; new petitions*
>
> a) The entry into effect of this Arrangement is conditional upon:
>
> * * * * * * *
>
> (2) The initiation of the legal process by or on behalf of the ROKG [Korea] or the relevant producers to terminate all existing countervailing duty and antidumping duty orders on covered products listed in Appendix A before March 30, 1985. Should this process not result in the termination of these orders within a reasonable period, the ROKG shall consult with the U.S. to determine what mutually agreeable action should be taken.

Declaration of Eric J. Sinrod in Support of Motion for Judgment Upon an Agency Record, Exhibit A, Voluntary Restraint Arrangement at 2.

A letter from the Deputy United States Trade Representative, which is part of the VRA, further provides that:

> if revocation does not take place within a reasonable period of time, the Government of the United States of America will agree to the termination of the Arrangement with respect to those products subject to the remaining order. In determining what constitutes a reasonable period of time, due consideration shall be given to the reason for the delay.

Declaration of Eric J. Sinrod in Support of Motion for Judgment Upon an Agency Record, Exhibit A, Letter from Robert E. Lighthizer to Kim Chulsu at 4 (May 8, 1985).

[2] Gilmore claims that the majority of Korean steel plate imports are targeted to the West Coast and that the other domestic parties do not produce steel plate in that region of the country. Hence, according to Gilmore, a majority of the domestic industry is willing to forego the fair pricing protection provided by the antidumping order with respect to steel plate in favor of quantitative restrictions on other steel products. *See Plaintiff's Motion for Judgment Upon an Agency Record* at 15.

[3] *See* Tariff Act of 1930, § 751(a), 19 U.S.C. § 1675(a) (1982 & Supp. III 1985).

Prior to amendment, *see* Trade & Tariff Act of 1984, Pub. L. 98–573 § 611(a)(2), 98 Stat. 3031 (1984), § 1675(a) provided automatically for annual administrative review of an antidumping order. Under current law, which is effective with respect to antidumping investigations initiated on or after Oct. 30, 1984, *see* § 626(b)(1), 98 Stat. at 3042, such review is conducted only upon request.

sushita Elec. Indus. Co. v. *United States*, 823 F.2d 505, 506 (Fed. Cir. 1987)); *see also Freeport Minerals Co.* v. *United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985) ("The 'review' referred to in 19 U.S.C. § 1675(c) * * * is mandated by 19 U.S.C. § 1675(a), 'Periodic review of amount of duty.' ").

Commerce's implementing regulation, 19 C.F.R. § 353.54 (1987), provides in part:

> (a) *In general.* Whenever the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order or a suspended investigation are no longer being made at less than fair value within the meaning of section 731 of the Act and is satisfied that there is no likelihood of resumption of sales at less than fair value, he may act to revoke or terminate, in whole or in part, such Order or Finding or suspended investigation. Ordinarily, consideration of such revocation or termination will be made only subsequent to a review as described in § 353.53 of this part.

Against this background, the government urges that revocation is proper once a majority of the domestic industry, for whatever reason, no longer supports the continuation of an antidumping order, even in the absence of a review of the occurrence of dumping. Plaintiff, relying principally on the clear meaning of § 751(b), counters that revocation is improper here given the failure to complete a review of the affirmative determination regarding the existence of less-than-fair-value sales. *See Plaintiff's Motion for Judgment Upon an Agency Record* at 6–7. Gilmore contends that the revocation amounts to a substitution of the VRA for the antidumping order based on a preference for the former by a majority of the domestic industry. *Plaintiff's Reply Memorandum* at 6–8. Defendant, in the course of rejecting these arguments, asserts that:

> the revocation was based not upon the VRA, but rather upon the domestic industry's lack of interest in the continuation of the antidumping duty order. While the domestic industry cited the VRA as an example of a 'changed circumstance' warranting review of the order, the reason or reasons for the domestic industry's lack of interest are irrelevant from [Commerce's] point of view.

Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record at 20 (citation to administrative record omitted) (hereinafter "Defendant's Memorandum at —— "). In support of its position, the defendant offers arguments based on the statute, Commerce's implementing regulations, and judicial precedent.

The government interprets the statutory language "after review under this section" contained in § 1675(c) as referring to either review under § 1675(a) or § 1675(b). *Defendant's Memorandum* at 9. Under the defendant's view, to avoid rendering § 1675(b) mere surplusage, that subsection must be construed as providing for some-

thing other than the determination of actual antidumping duties for a given time period pursuant to § 1675(a). To this end, the defendant argues that § 1675(b) provides for a review of "changed circumstances." *Id.* at 12. Defendant apparently concludes that upon ascertaining that majority support for the antidumping order had dissolved, its § 1675(b) review was complete and revocation was therefore proper.

As further authority for Commerce's determination, the defendant relies upon the following regulation:

> (c) *Revocation or termination by the Secretary.* The Secretary may on his own initiative revoke a Finding or Order or terminate a suspended investigation after three years if he is satisfied that (1) there is no likelihood of resumption of imports of the merchandise to the United States the sale of which has been made at less than fair value, or (2) the sales at less than fair value have been eliminated, or (3) other changed circumstances warrant a revocation of the Finding or Order or the termination of a suspended investigation.

19 C.F.R. § 353.54(c) (1987).[4] Although subsections (c)(1) and (c)(2) undeniably envision an inquiry into the occurrence of dumping, defendant suggests that subsection (c)(3) permits the agency to revoke solely upon the presence of other changed circumstances.

Additionally, defendant attempts to engraft the holding of *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 585 F. Supp. 670 (1984), onto the circumstances of this case. The *Gilmore* court held that a petitioner lacking the support of a majority of the domestic industry cannot offer an antidumping petition "on behalf of an industry" as required by the relevant statute. *Gilmore,* 7 CIT at 226, 585 F. Supp. at 676. Defendant reasons that if a petition may not properly be offered when a majority of the domestic industry does not support it, then "the [Commerce] Department should not be required to perpetuate an antidumping duty order when a substantial majority of the domestic industry requests revocation." *Defendant's Memorandum* at 16.

Section 1675(a) provides for periodic review of the basis and amount of duty to be assessed under an antidumping duty order. *Matsushita,* 823 F.2d at 506. Section 1675(b), entitled "Reviews upon information or request" provides in part:

> (1) **In general.**—Whenever the administering authority or the Commission receives information concerning, or a request for the review of * * * an affirmative determination made under section * * * 1673d(a), 1673d(b) * * * of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register.

[4] The Court refers to this regulation solely to present defendant's position. Therefore, no consideration is given to whether Commerce's decision is more properly considered to be a revocation based upon application by a party to the proceeding, *see* § 353.54(b), or whether Commerce has complied with the three year waiting period specified in § 353.54(c).

Tariff Act of 1930, § 751(b), 19 U.S.C. § 1675(b) (1982 & Supp. III 1985).

It may be true—and plaintiff does not argue otherwise—that the lack of interest on the part of the domestic industry constitutes "changed circumstances" sufficient to warrant review. Nevertheless, the Court cannot conclude that the identification of that lack of interest ends Commerce's obligation under the statute. Section 1675(b) demands, by its plain language, that the agency conduct a review of its affirmative determination. As stated by the Court in *American Permac, Inc.* v. *United States,* 10 CIT ——, 656 F. Supp. 1228 (1986), *appeal docketed,* No. 87–1159 (Fed. Cir. Jan. 21, 1987): "[t]he antidumping law reserves to the Commerce Department (the 'administering authority') questions pertaining to whether and to what extent merchandise is being dumped, and—in 751(b) reviews—whether dumping is likely to continue or resume if a dumping order is revoked." *American Permac,* 10 CIT at ——, 656 F. Supp. at 1234.[5] In this case, Commerce failed to complete an administrative review and, in essence, chose to revoke because of the change in circumstances. This approach has been condemned by our appellate court:

> As an initial matter, we reject the view that a decision to undertake review creates an inference that the outstanding order is no longer necessary. A decision to undertake a review is a threshold decision which merely sets the review proceedings in motion and has no bearing on the merits. The evidence submitted in support thereof may or may not be persuasive on the issue of revocation.

Matsushita Elec. Indus. Co. v. *United States,* 3 Fed. Cir. (T) at 50, 750 F.2d at 932, *rev'g on other grounds,* 6 CIT at 31, 569 F. Supp. at 859 ("the finding of changed circumstances sets in motion the review process").

A cardinal principle of statutory construction states that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) (unanimous). A court generally assumes that "the legislative purpose is expressed by the ordinary meaning of the words used." *United States* v. *Locke,* 471 U.S. 84, 95 (1985) (quoting *Richards* v. *United States,* 369 U.S. 1, 9 (1962)). Ordinarily, if a court "find[s] the terms of a statute unambiguous, judicial inquiry is complete." *Burlington N. R.R.* v. *Oklahoma Tax Comm'n,* 55 U.S.L.W. 4583, 4584 (Apr. 28, 1987) (unanimous) (quoting *Rubin* v. *United States,* 449 U.S. 424, 430 (1981)). Assuming, however, that in this case it is appropriate to resort to the legislative history, not-

[5] *See also Matsushita Elec. Indus. Co.,* 6 CIT 25, 27–28, 569 F. Supp. 853, 856–57 (1983), *rev'd on other grounds,* 3 Fed. Cir. (T) 44, 750 F.2d 927 (1984) (emphasis added):

> In sum then, the choices of a party seeking a "changed circumstances" review under section 751(b) are two. *It can seek review by the ITA on the question of sales at less than fair value and, if the ITA still finds the presence or likelihood of sales at less than fair value,* it can move on to the ITC and seek a conclusion that, nevertheless, material injury will not result. As an alternative, a party can forego review by the ITA and go directly to the ITC. The latter strategy must result in the unalterable presumption in the ITC review that such sales as there will be, will be at less than fair value.

withstanding the Supreme Court's admonition that "[g]oing behind the plain language of a statute * * * is 'a step to be taken cautiously' even under the best circumstances," *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982) (quoting *Piper* v. *Chris-Craft Indus.*, 430 U.S. 1, 26 (1977)), the Court is unable to discern any indication of Congressional intent which contradicts the language of the statute. In discussing review based on changed circumstances, the Senate Finance Committee Report accompanying the Trade Agreements Act of 1979 states:

> In addition *the authority could review, upon request, a determination* that a subsidy exists or *that less-than-fair value sales exists.* The ITC could review, upon request, a determination that a domestic industry is being injured by reason of imports of subsidized merchandise or imports of merchandise sold at less than fair value.
>
> *The authority* and the Commission *would initiate reviews under this provision only if they are satisfied that "changed circumstances" sufficient to warrant the review exist.* Absent a showing of "good cause", the ITC would not review a final affirmative injury determination under the countervailing duty or antidumping duty law and the administering authority would not review (1) * * * or (2) a final affirmative determination that a subsidy exists or that sales at less-than-fair value exist, less than 24 months after the date of publication of notice of that determination.
>
> *If the administering authority determines, during a review under this section, that* a subsidy or *sales at less-than-fair value no longer exists, the administering authority could, after that review, revoke, in whole or in part,* a countervailing duty order or *an antidumping order.*

S. Rep. No. 249, 96th Cong., 1st Sess. 80 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 466 (emphasis added); *accord* H. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979). This language, which largely echoes that of the statute, is consistent with the principle that a change in circumstances triggers a review and is not a substitute for such a review.

Despite the foregoing, defendant, *see Defendant's Memorandum* at 14, seeks to buttress its position by relying on the last sentence of the following passage from the legislative history to the Trade and Tariff Act of 1984:

> [The amendment to § 751(a)] is designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority. The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested * * *. Further, the administering authority should be able to revoke antidumping or countervailing duties [sic] that are no longer of interest to domestic interested parties.

H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 181 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5220, 5298.

The Conference Committee Report accompanying the 1984 amendments principally discusses two alterations of § 1675. First, it explains the amendment providing for periodic review of an antidumping order only upon request. Second, it expounds upon language added to § 1675(b) which was designed "to clarify the role of the ITC in review investigations under section 751 of the Traiff [sic] Act of 1930." H.R. Conf. Rep. No. 1156 at 182, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 5299. Clearly, neither of these amendments addresses—much less endorses—the concept that loss of majority support for an antidumping order disposes of Commerce's statutory obligation to conduct a review under § 1675(b).[6] The court is, therefore, highly reluctant to rely on a snippet of legislative history to inform its interpretation of the statutory provision at issue here.

In any event, where an interested party, such as Gilmore, opposes revocation, it is incorrect to conclude that the antidumping order is "no longer of interest to domestic interested parties" even though the order is not supported by a majority of domestic producers.[7] Moreover, the Conference Committee's statement should be analyzed in the context of the existing language of § 1675. Both § 1675(a) and the interpreting regulation, 19 C.F.R. § 353.53a(a)(1) (1987),[8] appear to provide for annual review of an antidumping order on request of a single interested party. Thus, if it is true that Gilmore's "interest" in the antidumping order would be sufficient to obtain review under § 1675(a), then the Court finds no basis upon which to view Gilmore's interest as any less sufficient for purposes of § 1675(b) review.

Finally, the Court must reject defendant's proposed analogy between the initiation of an antidumping investigation and the continuation of an antidumping order. The petition filing requirements explicitly demand that a petition be offered "on behalf of an industry." 19 U.S.C. § 1673a(b) (1982 & Supp. III 1985). In contrast, § 1675 contains no reference to industry support as a precondition for obtaining review of an antidumping order. *See* 19 U.S.C. § 1675(a)–(c). More fundamentally, the government's position ignores the principle that "a review investigation [does not] begin[ ] on a clean slate just as though it were an original investigation to determine wheth-

[6] Indeed, the Report concludes that "[i]n short, the ITC must determine that, in light of the 'changed circumstances,' the revocation of the order will not result in material injury or threat of material injury to the U.S. industry." H.R. Conf. Rep. No. 1156 at 183, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 5300. In light of the obligation imposed on the ITC, the Court, absent a clear indication to the contrary, is unwilling to presume that Congress intended that the § 1675(b) review to be undertaken by the ITA is complete once changed circumstances are identified.

[7] The Court observes that the definitional section of subtitle IV of Title 19 of the United States Code distinguishes between an "industry" and an "interested party." *Compare* § 1677(4)(A) (" 'industry' means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product * * *.") *with* § 1677(9)(C) ("interested party" includes a manufacturer, producer, or wholesaler in the United States of a like product).

[8] The pertinent portion of the regulation provides:

> (a) *Request for administrative review.* (1) Each year during the anniversary month of the publication of an order or finding * * * an interested party, as defined in section 771(9)(B), (C), (D), (E), or (F) of the Act, may request in writing that the Secretary conduct an administrative review * * *.

er an antidumping order should be put into effect." *Matsushita*, 750 F.2d at 932.[9] An antidumping order was originally issued because upon investigation into Gilmore's properly filed petition, the ITA and ITC, respectively, made determinations of dumping and injury. *See* H.R. Conf. Rep. No. 1156 at 182, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 5299. ("For that reason, a section 751 review does not begin from an entirely neutral starting point."). To the extent that revocation occurred in this case in violation of the statutory requirements, Commerce's action amounts to a disregard of those determinations. The Court, in the absence of any support in the statutory text or in the relevant legislative history, is unwilling to sanction that disregard by fashioning, what, in effect, amounts to an additional rule of standing that would require Gilmore to demonstrate majority support in order to obtain the review mandated by § 1675(b).

CONCLUSION

Under the facts of this case, Commerce may not dispense, over Gilmore's opposition, with the statutory mandate to complete a review prior to the revocation of the antidumping order. Consequently, Commerce must complete an administrative review pursuant to § 1675(a) and then assess the likelihood of dumping in the absence of the order. Only at that juncture may Commerce properly make a decision as to whether revocation is warranted.

In closing, the Court stresses that, by virtue of this opinion, it simply holds that Commerce's decision to revoke was not in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B) (1982) since the agency failed to fulfill its statutory obligation to complete a review prior to revocation. The Court offers no comment on the manner in which the results of the required review should bear on the decision to revoke. Any decision on that matter must necessarily await further proceedings in this action.

(Slip Op. 87–113)

FABRICAS EL CARMEN, S.A., DE C.V., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85–04–00558

[Remanded.]

[9] The following language from the decision in *Freeport Minerals Co.* v. *United States*, 776 F.2d 1029, 1033 n.4 (Fed. Cir. 1985) is not to the contrary:

> Although the Government and intervenors attempt to distinguish between the requirements for the *initiation* of an investigation and those for the *perpetuation* of an order, they have offered no reasonable explanation why Congress would have thought the latter a less important or less critical determination warranting less current findings.

That footnote cannot be construed as an endorsement of the principle that the requirements for the initiation of an investigation are identical to those for the revocation of an order.

(Decided October 7, 1987)

Skadden, Arps, Slate, Meagher & Flom (Thomas R. Graham) for plaintiff Derivados Acrilicos, S.A.

Cabinet Hays (Alan S. Hays and *Ben L. Irvin)* and *Green and Hillman (Richard G. Green)* for all other plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M, Cohen,* Director, Commercial Litigation Branch *(J. Kevin Horgan),* Civil Division, United States Department of Justice, for defendant.

Opinion and Order

Restani, *Judge:* Plaintiffs challenge an affirmative countervailing duty determination of the United States Department of Commerce, International Trade Administration (ITA) finding that a net bounty or grant of 3.7% *ad valorem* is bestowed upon certain Mexican textile mill products by export related FOMEX loans.[1] *See, Certain Textile Mill Products from Mexico,* 50 Fed. Reg. 10824 (Mar. 18, 1985) (final affirmative countervailing duty determination and order). Plaintiffs raise the following major issues in their motion for judgment upon an agency record pursuant to Rule 56.1 of the rules of this court:

(1) Whether the effects of Mexico's dual exchange system or other factors negate or offset any benefit which the FOMEX program might bestow upon exporters of textile mill products;

(2) Whether ITA erred in failing to use the Government of Mexico's cost of borrowing in calculating the benefit bestowed by FOMEX loans;

(3) Whether ITA erred in disregarding increases in FOMEX interest rates, which were reported and known to ITA prior to both its preliminary and final determinations, but which took effect beyond the period under investigation;

(4) Whether ITA erred in failing to include data on certain companies in the base upon which a country-wide countervailing duty rate was calculated, particularly data on companies that were found to have received *de minimis* benefits or no benefits at all;

(5) Whether ITA erred failing to establish a two-tier countervailing duty deposit rate in this case.

ITA initiated its countervailing duty investigation on August 13, 1984, 49 Fed. Reg. 32894 (Aug. 17, 1984), and sent its first questionnaire to the Government of Mexico on August 24, 1984, defining the period of review as the calendar year 1983 and any fiscal quarters completed thereafter. P.R. 15. The period of review was subsequently limited to 1983. *Certain Textile Mill Products from Mexico,* 50

[1] ITA translates FOMEX to stand for the "Fund for the Promotion of Exportation of Mexican Manufactured Products." *Certain Textile Mill Products from Mexico,* 50 Fed. Reg. 10824 (Mar. 18, 1985) (final affirmative countervailing duty determination and order). FOMEX is a trust of the Secretaria de Hacienda y Credito Publico established to promote the manufacture and sale of exported products. 50 Fed. Reg. at 10825. The Bank of Mexico acts as its trustee and, as of July 27, 1983, the fund has been formally incorporated into the National Bank for Foreign Trade. *Id.*

ITA also found that bounties or grants were conferred by the following programs: Preferential Federal Tax Credits (CEPROFI), Fund for Industrial Development (FONEI), and Guarantee and Development Fund for Medium and Small Industries (FOGAIN). *Id.* In its preliminary determination, ITA found that the four programs conferred bounties or grants of: 3.7% (FOMEX), 2.1% (CEPROFI), 2.27% (FONEI), and 3.2% (FOGAIN). *Certain Textile Mill Products from Mexico,* 50 Fed. Reg. 301 (Jan. 1, 1985) (preliminary determination). It was quickly discovered that the benefits attributed to three of the programs had been overstated by three decimal points, and in its final determination ITA found bounties or grants of: 3.7% (FOMEX), 0.0005% (CEPROFI), 0.009% (FONEI), and 0.005% (FOGAIN). 50 Fed. Reg. at 10825–26.

Fed. Reg. at 304 (preliminary determination) and 50 Fed. Reg. at 10825 (final determination). The Government of Mexico's response indicated, among other things, that the industry subject to investigation was made up of 2,150 companies, 95% of which were small or medium size firms, and that more than 85% of the industry's exports to the U.S. were represented by 27 listed exporters. P.R. 27 and Confidential Record (C.R.) 1 at I.A., I.B. and Exhibit C. ITA sent questionnaires to 26 of the 27 firms reported by the Government of Mexico.[2] Four of those 26 investigated companies either did not export the subject merchandise during the period of review, or produced products that were not included in the investigation. Six of the remaining 22 firms, as well as seven others, were excluded from ITA's determinations upon timely requests and verification that they did not receive greater than *de minimis* benefits. 50 Fed. Reg. at 302 (preliminary determination); 50 Fed. Reg. at 10825 (final determination).

The 16 remaining firms provided, in part, the basis for ITA's calculation of a country-wide countervailing duty rate resulting from the FOMEX program. ITA concedes, however, that it erred in its calculations. Defendant requests a remand after all contested issues have been resolved for the limited purpose of correcting its "computational" errors.

Discussion

I. The Effect of the Controlled Exchange Rate System Upon Benefits Received From FOMEX Loans

In 1982, the Government of Mexico decreed that two foreign exchange markets would function simultaneously in the country—one free-floating and the other subject to control. Foreign Currency Exchange Decree effective December 20, 1982 *reprinted in* [Statutory Volume] *Doing Business in Mexico* app. W2, W2–3 (S. Lefler ed. 1987) (English translation).[3] *See* Public Record (P.R.) 56 at II.I. According to the Government of Mexico, "[t]he controlled rate was applicable to all exports and services, except the maquiladora (in bond) industry, handcrafts and the tourist industry."[4] P.R. 56 at II.A. *See* P.R. 56 at II.I The Foreign Currency Exchange Decree pro-

[2] The Government of Mexico added a 28th name to their list, P.R. 36 at 12. The 28th firm had not yet exported textile mill products into the U.S., *id.*, and was not investigated. Defendant's Brief at 36. Another firm, Industrias Polifil, was already subject to a suspension agreement in another proceeding, *see Yarns of Polypropylene Fibers from Mexico*, 48 Fed. Reg. 5581 (Feb. 7, 1983) (suspension of investigation), 48 Fed. Reg. 14427 (Apr. 4, 1983) (final affirmative countervailing duty determination), and was excluded from the scope of ITA's investigation. Defendant's Brief at 36; 50 Fed. Reg. at 302.

[3] The December 20, 1982 decree provides the statutory basis for Mexico's dual exchange markets at issue in this case and was explicitly referenced and relied upon by the Government of Mexico in its answers to ITA's questionnaire. *See* Public Record (P.R.) 56 at II.I. In response to the court's request for English translations of the 1982 decrees at issue, the parties submitted a Decree Establishing General Exchange Controls appearing in the September 1, 1982 Official Diary. This decree, however, does not directly provide for Mexico's dual exchange rate system. In addition, the September 1, 1982 decree was apparently annulled by the December 20, 1982 decree. *Doing Business in Mexico* at app. W2–7 ("All of the following are annulled: the Decree establishing Generalized Foreign Currency Exchange Controls as published in the Official Gazette of the Federation on September 1, 1982 * * *.").

[4] Article Two of the decree provides that the controlled foreign currency market includes certain: (a) exports of merchandise (with exceptions, to be established by regulation, for merchandise that is unsuited to control); (b) payments made by "in bond" assembly companies for goods and services (wages, salaries, rentals); (c) capital and interest on foreign currency financing; (d) imports of merchandise; (e) expenses, fees and contributions relating to Mexican Foreign Service and participation in international organizations; and (f) those areas provided for through Treasury Department regulations. *Doing Business in Mexico* app. W2–3.

vides that exports which are subject to the controlled rate must be invoiced in foreign currencies, and that "[i]n no case shall exports be contracted to be paid in national currency." *Doing Business in Mexico* at app. W2–4 (Article Three of the Decree). It is claimed that during 1983, the period under investigation, the controlled rate was about 25% lower than the free market rate, P.R. 56 at II.I, and 31% lower than the international rate of exchange. P.R. 103 at III.A.1. Thus, pursuant to the Foreign Currency Exchange Decree, non-exempt exporters incur significant losses when they must exchange their U.S. dollar earnings for Mexican pesos at the less favorable controlled rate of exchange.

The FOMEX programs at issue involve pre-export and export loans to firms exporting manufactured products. P.R. 36 at A.a.5 and A.a.6. Pre-export loans generally are made in Mexican pesos, though they were temporarily available in U.S. dollars. Export loans are to be made in U.S. dollars. *Id.*

A. The Positions of the Parties

The parties do not dispute that an exchange rate loss is incurred by firms repaying FOMEX peso loans, where U.S. dollar earnings are converted to pesos at the time of repayment at the controlled, rather than free, rate of exchange. Plaintiffs allege, however, that FOMEX "dollar" loans were actually paid out in pesos, at the controlled rate of exchange, and argue that as a result, firms also incurred exchange rate losses in the receipt of, and devaluation losses in the repayment of, FOMEX "dollar" loans,[5] ITA responds that there was insufficient evidence presented to consider the allegation that dollar loans were actually paid out in pesos, and that this allegation was not raised until after ITA had conducted its verification. The court finds that plaintiffs had ample opportunity to make a timely presentation of evidence to support this allegation, and they failed to do so.[6]

It may be, however, that what plaintiffs mean by receipt of dollar loans in pesos is that those in plaintiffs' position seem to be required by law in some instances to sell at the official rate the foreign currency which they borrow. This appears to be a result of a

[5] If dollar loans were paid out in dollars and repaid in dollars, there might be no currency conversion at any rate of exchange, and no loss in either the receipt or repayment of the loan. If, on the other hand, dollar loans were converted to pesos, firms could suffer a loss in the receipts of "dollar" loans. In addition, plaintiffs argue that the repayment of such loans could result in a loss associated with the devaluation of pesos over time (even though the repayment would not involve a currency conversion). This devaluation loss is based upon the assumption that if loans are actually paid out in pesos, repayment should be linked to the number of pesos actually received, rather than the dollar amount of the loan. For example, if a firm took out a $100 (U.S. dollar) loan it would have to assign $100 of its U.S. dollar earnings to the repayment of the loan principal. The firm would actually receive, however, only the peso equivalent of that $100 at the time of the loan. If the applicable exchange rate at the time of the loan was 150 pesos to the dollar, the firm would receive 15,000 pesos. If, due to devaluation, the exchange rate at the time of repayment was 200 pesos to the dollar, then the assigned U.S. dollar earnings, $100, would be worth 20,000 pesos. Under plaintiff's reasoning, the amount of assigned U.S. dollar earnings should be reduced in that case to $75—or the current equivalent of the 15,000 pesos originally paid to the firm.

[6] The alleged payment of "dollar" loans in pesos was not mentioned by either the Government of Mexico or counsel for certain excluded firms when they asked ITA to consider losses incurred by the firms under investigation. P.R. 56, 58 & C.R. 3. Furthermore, ITA's questionnaires specifically asked firms to specify "the currency (pesos or dollars)," of each loan received, and asked the Government of Mexico to explain "the specific nature and terms of the assistance received by the companies under investigation." P.R. 15 at 5 & 50 at 11. The only response which might have suggested the possibility that dollar loans were actually paid out in pesos involved loans received by a single firm after the period under investigation. C.R. 4 [Response of Tauro Textile]. That response merely listed FOMEX export loans in pesos. Export loans were identified as dollar loans by the Government of Mexico P.R. 36 at A.a.6, and listed as such by all other firms. C.R. 4. Finally, ITA's verification of FOMEX loans do not indicate that any loans listed in dollars had actually been paid out in pesos. C.R. 13.

general condition of receiving foreign currency loans, regardless of whether such loans are provided by the Mexican credit institutions or foreign financial institutions. *See Doing Business in Mexico,* W2–5 (Article Six of the Decree). The particular effect of this policy on the firms involved in this proceeding was not addressed by the parties in a timely manner during the administrative proceedings. Thus, ITA need not consider it.

ITA consistently has held that FOMEX loans confer countervailable benefits. *See, e.g., Certain Iron-Metal Construction Castings from Mexico,* 48 Fed. Reg. 8834 (Mar. 2, 1983); *Carbon Black from Mexico,* 48 Fed. Reg. 29564 (Jun. 27, 1983); *Portland Hydraulic Cement and Cement Clinker from Mexico,* 48 Fed. Reg. 43063 (Sept. 21, 1983); *Lime from Mexico,* 49 Fed. Reg. 35672 (Sept. 11, 1984). In these same cases, ITA also determined that Mexico's dual exchange rate system did not confer countervailable benefits.[7] *Id.* In this case, however, plaintiffs do not argue the independent countervailability (or lack thereof) of either program, but rather, argue that the operation of the two programs together negates any subsidy in connection with FOMEX loans.

Plaintiffs argue that there is no bounty or grant because Mexico's dual exchange rate system eliminates any benefit which exporting firms might receive from export-related FOMEX loans. In the alternative, they argue that in calculating the "net subsidy," the loss resulting from Mexico's exchange rate system should be deducted as an "application fee, deposit, or similar payment paid in order to qualify for, or to receive the benefit of the subsidy." 19 U.S.C. § 1677(6) (Supp. III 1985).

B. The Existence of a Bounty or Grant

Congress has granted ITA wide latitude in determining whether a bounty or grant exists. *United States* v. *Zenith Radio Corp.,* 64 CCPA 130, 138, 562 F.2d 1209, 1216 (1977), *aff'd,* 437 U.S. 443 (1978). *See* S. Rep. No. 249, 96th Cong., 1st Sess. 84 (1979). As noted previously, in other circumstances ITA has determined that FOMEX loans constitute bounties or grants.

Plaintiffs cite *Robert E. Downs* v. *United States,* 187 U.S. 496 (1903); *G.S. Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, T.D. 36426, 30 Treas. Dec. 857, *aff'd* 249 U.S. 34 (1919); and *United States* v. *Zenith Radio Corp.,* 437 U.S. 443 (1978) *(Zenith)* in support of the broad proposition that there must be an overall "benefit" to the exporter in order to find a bounty or grant. All three decisions involved the issue of whether rebates or remissions of indirect taxes are countervailable. In *Downs* and *Nicholas* the Treasury Depart-

[7] These cases involved an aspect of Mexico's dual exchange rate system not at issue here. Specifically, when exchanging pesos for U.S. dollars to make certain foreign purchases, companies were allowed to convert currency at the controlled rate (giving up fewer pesos per dollar than they would at uncontrolled rates). In most of those cases, ITA verified that the same dual exchange system which permits firms to exchange pesos for dollars at the controlled rate also requires exporters to exchange their U.S. dollars for pesos at the same rate (receiving fewer pesos for their dollars) and concluded that the program appears to harm rather than benefit Mexican exporters. *Carbon Black from Mexico,* 48 Fed. Reg. at 29567; *Iron-Metal Castings from Mexico,* 48 Fed. Reg. at 8837; *Portland Cement from Mexico,* 48 Fed. Reg. at 43067.

ment (the predecessor to ITA in these cases) imposed countervailing duties upon the excessive rebates or remissions of indirect taxes, while in *Zenith* Treasury refused to impose countervailing duties upon nonexcessive rebate or remission of indirect taxes. In each case, the Supreme Court upheld the agency's determination. In the most recent case, the Supreme Court clearly indicated that its ruling was based upon deference to, and the reasonableness of, the specific administrative practice of not countervailing nonexcessive remissions of indirect taxes, first adopted less than one year after the passage of the basic countervailing duty statute in 1897. *Zenith,* 437 U.S. at 457–59.

The current statutory definition of a "subsidy," 19 U.S.C. § 1677(5) (1982), which has the same meaning as "bounty or grant," *see, e.g., PPG Industries, Inc.* v. *United States,* 11 CIT ——, ——, 662 F. Supp. 258, 264 (1987), provides a starting point for determining whether a specific export payment such as rebate of indirect taxes is countervailable. That definition explicitly incorporates export subsidies which are listed in the Annex to the GATT Subsidies Code. 19 U.S.C. § 1677(5). The legislative history of section 1677(5) acknowledges that export payments need not be considered countervailable subsidies: "if those payments are reasonably calculated, are specifically provided as non-excessive rebates of indirect taxes within the meaning of Annex A of the Agreement, and are directly related to the merchandise exported." S. Rep. No. 249, 96th Cong., 1st Sess. 84–85, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 471. The Annex to the Subsidies Code recognizes as an export subsidy "[t]he exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption." Subsidies Code, Annex, item g, 31 UST at 546.

The special (non-countervailable) treatment afforded nonexcessive rebates of indirect taxes has been premised on the view that such rebates are a reasonable means of avoiding double taxation by the exporting and importing countries. *See Zenith,* 437 U.S. at 456. Without such remissions, consumption taxes might be imposed upon a product by both the exporting country, where it would not be consumed, and the importing country, where it would be consumed. *Id.* at 456–57. Non-excessive remission of such taxes is not considered to result in the type of competitive advantage that Congress intended to counteract. *Id. See also Zenith Electronics Corp.* v. *United States,* 10 CIT ——, ——, 633 F. Supp. 1382, 1398 (1986). In contrast, the Supreme Court in *Zenith* noted that, under both U.S. law and the General Agreement on Tariffs and Trade (GATT), remissions of *direct* taxes are countervailable, regardless of whether they are excessive or not. *Id.* at 458 n.14.[8]

[8] After the *Zenith* opinion, that interpretation was reaffirmed under GATT in the Illustrative List of Export Subsidies annexed to the Subsidies Code. General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, *Continued*

Given the very narrow problem at issue in *Zenith*, and its statutory and historical underpinnings, one cannot read the Supreme Court's opinion for the broad propositions which plaintiffs assert. Assuming *arguendo* that *Zenith* applies to anything other than non-excessive rebates of indirect taxes, it could only shed light on a very closely analogous situation. There are many reasons why the programs at issue cannot be analogized to non-excessive rebate of indirect taxes. Certainly Mexico's exchange rate policies do not fit within common notions of indirect taxes.[9] Furthermore, it is difficult to view the programs as effecting the type of non-excessive rebate which Congress had in mind in the indirect taxation area.[10]

Most importantly, there is no evidence that low interest rate FOMEX loans are specifically provided for the purpose of rebating or remitting the losses incurred by firms when their U.S. dollars are exchanged for pesos at the controlled rate of exchange. As defendant has noted "[t]here is simply no relationship between the receipt of FOMEX financing and the imposition of controlled exchange rates, other than the common idea that one must export in order to be eligible or subject to either one." Defendant's Brief at 21.[11] ITA has found, and plaintiffs do not dispute directly, that exchanging dollars for pesos at the controlled rate of exchange is a basic condition of exportation of certain products. The condition applies regardless of whether or not exporters have applied for or received FOMEX benefits. 50 Fed. Reg. at 10829. Although plaintiffs take issue with ITA's characterization that "this system applies to *practically all* exporters in Mexico," they do not dispute the fact that non-exempt exporters, including textile exporters, who neither applied for nor received FOMEX loans would still be subject to the controlled exchange rate.[12] The conversion of dollar export earnings to pesos at the less favorable controlled exchange rate is thus in the nature of a general expense, borne by the exporter in order to com-

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XVI and XXIII of the General Agreement on Tariffs and Trade, 31 U.S.T. 513, 546–47, T.I.A.S. No. 9619 at 29–30 (Subsidies Code).

[9] The terms direct and indirect taxes have been defined by the Subsidies Code as follows:

> The term "direct taxes" shall mean taxes on wages, profits, interest, rents, royalties, and all other forms of income, and taxes on the ownership of real property;
> * * * * * * *
> The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all other taxes other than direct and import charges;

Subsidies Code, Annex, n.1, 31 U.S.T. at 548. Websters defines these terms as follows:

> **direct tax** *n* : a tax exacted directly from the person on whom the ultimate burden of the tax is expected to fall (property, income, gift, inheritance, and poll taxes are generally included under *direct taxes*)
> **indirect tax** *n* : a tax exacted indirectly from a person other than the one on whom the ultimate burden is expected to fall (excise and customs duties are generally included under *indirect taxes*)

Websters Third New International Dictionary 642 & 1152 (1981). *See also, American Express Co.* v. *United States*, 60 CCPA 86, 95 n.9, 472 F.2d 1050, 1057 n.9 (1973) ("Taxes levied directly on the sale of products and only indirectly related to income and profits, like excise, sales and turnover taxes are denominated generally 'indirect' taxes. Taxes levied on profits, as income and corporate profits taxes, constitute so-called 'direct' taxes,") and *Zenith*, 437 U.S. at 446 (" ' indirect' tax—a tax levied on the goods themselves").

In economic reality these distinctions might not be so clear, *see e.g.*, Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 L. & Policy in Int'l Bus. 327, 351 (1975), *cited in Zenith*, 437 U.S. at 458 n.14, but the distinctions have not been abandoned, as *Zenith* indicates. 437 U.S. at 458–59.

[10] The Subsidies Code, as incorporated by 19 U.S.C. § 1677(5), states that a countervailable subsidy is the remission of indirect taxes "in excess of those levied in respect of the production and distribution of like products *when sold for domestic consumption*." Subsidies Code, Annex, item g, 31 UST at 546 (emphasis added). As there is no equivalent of an indirect tax involved, there is no domestic corollary for comparison purposes.

[11] To the extent that the controlled rate applies to certain non-export transactions, defendant has conceded too much.

[12] After noting that certain significant industries are specifically exempt from the controlled rate that is applicable to exporters generally, plaintiffs merely conclude that: "[i]t is thus clear that the dual rate system does not apply to practically all exporters, although it does apply to these textile exporters." Plaintiffs' Brief at 28.

ply with a basic condition of exporting mandated by the 1982 decree.[13]

Thus, not only must the situation at hand be distinguished from non-excessive rebate of indirect taxes, but the court finds nothing in the three Supreme Court cases cited which aids plaintiffs in this case. The programs at issue operate so independently that the court cannot conclude that the benefits provided by FOMEX loans are negated by exchange rate policies in such a way that the loans are not subsidies. ITA is not required to consider the various policies regulating a country's economy in deciding whether a particular program is countervailable. The FOMEX program clearly benefits those firms that participate in it; the fact that exporters incur losses under the exchange rate system does not render ITA's finding that the FOMEX program confers a bounty or grant erroneous.

C. The Availability of Offsets in Determining Net Subsidies

Plaintiffs argue that the forced surrender of the dollar value of textile exports resulting from Mexico's controlled exchange rate system should be subtracted from the gross subsidy, pursuant to 19 U.S.C. § 1677(6)(A), as an "application fee, deposit, or similar payment paid in order to qualify for, or to receive the benefit of the subsidy." Plaintiffs' Brief at 29–30.[14]

In its final determination, ITA (DOC) responded to plaintiffs' proposed offset of exchange rate losses as follows:

> *DOC Position:* Section 771(6) of the Act [19 U.S.C. § 1677(6)] provides for three types of permissible offsets in the calculation of a net subsidy. The Department has consistently interpreted this provision as the exclusive source of permissible offsets. Adjustments which do not strictly fit the descriptions under section 771(6) have been disallowed.
>
> The Department has previously acknowledged that the dual exchange rate system in Mexico potentially harms Mexican exporters. See *Portland Hydraulic Cement and Clinker from Mexico,* 48 FR 43063 (1983). Yet this system applies to practically all exporters in Mexico regardless of whether those exporters have applied for or received FOMEX financing. Exchanging dollars at the controlled rate is a condition of exporting, rather than an application fee, deposit, or similar payment paid in order to

[13] The court does not reach the issue of lack of benefit resulting from the alleged granting of dollar loans in pesos or forced conversion of such loans. One might argue, however, that that conversion to pesos at the controlled rate (pursuant to the December 20, 1982 decree), is in the nature of a general expense imposed upon all foreign currency loans as part of Mexico's overall monetary policies.

[14] Plaintiffs limit their grounds for seeking an offset to the statutory definition of "net subsidy" under 19 U.S.C. § 1677(6)(A), and do not argue that ITA has discretion to apply additional offsets in determining the "net amount of such bounty or grant" under 19 U.S.C. § 1303. The reasons for limiting the offsets available in calculating the "net amount of such bounty or grant" to those provided for in the calculation of "net subsidy" have been explained by ITA (DOC) in previous determinations.

> Section 771(5) of the Act explicitly states that the term "subsidy" has the same meaning as the term "bounty or grant." References in the legislative history to a broad definition of the term subsidy apply equally to the term "bounty or grant" and to the term "subsidy." Defining the term "bounty or grant" in a more restrictive sense than the term "subsidy" would be *ultra vires* and would in effect penalize countries that had signed the Subsidies Code.
>
> * * * * * * *
>
> The DOC has consistently limited offsets in the calculation of a net subsidy to those offsets provided for under section 771(6) regardless of whether the DOC was conducting its investigation under section 303 or under Title VII of the Act.

Cotton Sheeting and Sateen from Peru, 48 Fed. Reg. 4501, 4506 (Feb. 1, 1983); *Cotton Yarn from Peru,* 48 Fed. Reg. 4508, 4513 (Feb. 1, 1983). *See also PPG Industries, Inc.* v. *United States,* 11 CIT ——, ——, 662 F. Supp. 258, 264 (1987) and cases cited therein.

> qualify for, or to receive, the benefit or [sic] a specific subsidy program. Therefore, the effects of the dual exchange system have not been taken into account in the calculation of the benefits of FOMEX loans.

50 Fed. Reg. at 10829.

ITA's narrow and strict interpretation of 19 U.S.C. § 1677(6) is supported by the legislative history of that provision, which states that "[f]or the purposes of determining the net subsidy, there is subtracted from the gross subsidy only the items specified in [19 U.S.C. § 1677(6)]. The list is narrowly drawn and is all inclusive." S. Rep. No. 249, 96th Cong., 1st Sess. 86 (1979). By not incorporating certain previously recognized offsets into section 1677(6), Congress intended "to place clear limits on offsets from a gross subsidy." *Id.*

ITA has consistently limited offsets in the calculation of a net subsidy to those offsets provided for under section 1677(6), *see, e.g., Cotton Sheeting and Sateen from Peru,* 48 Fed. Reg. at 4506; *Cotton Yarn from Peru,* 48 Fed. Reg. at 4513, and disallowed offsets which do not fall precisely within that list. *See, e.g., Certain Steel Products from Spain,* 47 Fed. Reg. 51438, 51447 (Nov. 15, 1982) (no offset for losses due to government price suppression); *Certain Carbon Steel Products from Brazil,* 49 Fed. Reg. 17988, 17996 (April 26, 1984) (no offset for reduced value due to administrative delay in disbursement of benefit); *Galvanized Carbon Steel Sheet from Australia,* 49 Fed. Reg. 29998, 30001 (July 15, 1984) (no offset for taxes on benefits received).

As indicated in the previous section, exchanging dollars for pesos at the controlled rate of exchange is in the nature of a general expense which is a basic condition of exporting. It is not an "application fee, deposit or similar payment paid in order to qualify for, or to receive the benefit of the subsidy." *Cf. Frozen Concentrated Orange Juice from Brazil,* 48 Fed. Reg. 8839, 8841 (Mar. 2, 1983) (cost of complying with conditions for obtaining export licenses is in the nature of a general expense rather than an offset under 19 U.S.C. § 1677(6)(A)).

II. ITA's Failure To Use the Government of Mexico's Cost of Borrowing as the Standard for Comparison With FOMEX Loans

Plaintiffs contend that ITA erred in using the U.S. Federal Reserve rate for short term business loans as a basis for comparison with FOMEX dollar loans, rather than the Government of Mexico's cost of borrowing. Plaintiffs reason that use of the Government of Mexico's cost of borrowing is mandated by 19 U.S.C. § 1677(5), which states, *inter alia* that

> The term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in section 1303 of this title, and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the Agreement (relating to the illustrative list of export subsidies).[15]

As plaintiffs note, item k of the "Illustrative List of Export Subsidies," describes "[t]he grant by governments * * * of export credits at rates below those which they have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit)." Subsidies Code, Annex, 31 U.S.T. at 547.

The Illustrative List of Export Subsidies annexed to the Subsidies Code, by its very terms, merely sets forth select examples of specific practices that constitute export subsidies. It is not an exclusive listing. Furthermore, the list only identifies countervailable practices; it does not specify the methodologies by which the amounts of specific subsidies and countervailing duties are calculated.[16]

The statutory definition of "subsidy" is similarly inclusive, rather than exclusive. It includes all practices determined to constitute a bounty or grant under 19 U.S.C. § 1303. 19 U.S.C. § 1677(5). In fact, it even explicitly includes "[t]he provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations * * *."[17] 19 U.S.C. § 1677(5)(B)(i). Thus, under section 1677(5), ITA was not limited to using the Government of Mexico's cost of borrowing for comparison with the FOMEX loans at issue.[18]

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[15] Item k of the list identifies one export subsidy as:

> (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.
>
> Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Annex, 31 U.S.T. 513, 547, T.I.A.S. No. 9619, at 30 (footnote omitted) (Subsidies Code).

[16] Most of the countervailable practices listed in the Subsidies Code are stated in terms that could not possibly be mistaken as methodological specifications, for example:

> (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
> (b) Currency retention schemes or any similar practices which involve a bonus on exports.
> * * * * * * *

Subsidies Code, Annex, 31 U.S.T. at 546.

[17] Paragraph B of 19 U.S.C. § 1677(5) provides:

> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
> * * * * * * *

[18] Plaintiffs do not argue that ITA erred in generally failing to use a comparable commercial rate for dollar loans in Mexico, rather than in the U.S. Apparently, however, ITA's policy is to use the rates for dollar loans in Mexico.

> For loans denominated in a currency other than the currency of the country concerned in an investigation, the benchmark is selected from interest rates applicable to loans denominated in the same currency as the loan under consideration (where possible, interest rates on loans in that currency in the country where the loan was obtained; otherwise, loans in that currency in other countries, as best evidence).

Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina, 49 Fed. Reg. 18006, 18019 (Apr. 26, 1984) ("Subsidies Appendix" setting forth general methodological principles) (explicitly incorporated in the final determination in this case at 50 Fed. Reg. 10825). Although ITA never explained its use of U.S. Federal Reserve rates in this case, it has justified the use of such rates in other cases involving FOMEX dollar denominated average commercial sort-term interest rates for dollar denominated loans in Mexico. *Bricks from Mexico*, 49 Fed. Reg. 19564, 19565 (May 8, 1984); *Bars and Shapes from Mexico*, 49 Fed. Reg. 32887, 32888 (Aug. 17, 1984).

III. ITA's Disregard of Changes in FOMEX Interest Rates That Took Effect After the Period Under Consideration

ITA was informed by the Government of Mexico, prior to the preliminary determination, that the interest rates on certain FOMEX loans were increased during the period of April through June 1984. Although the period covered by ITA's determinations was the calendar year 1983, ITA initially defined the period under investigation to include 1983 and any fiscal quarters completed thereafter. P.R. 15. The Government of Mexico's response to ITA's questionnaire indicated that certain interest rates for FOMEX loans had been increased for the period of April through June 1984, and that such rates would be reviewed every three months. P.R. 36 at A.a.6. and Exhibit I. The Government's response was dated October 1, 1984, three months prior to ITA's preliminary determination of January 3, 1985.[19]

Plaintiffs argue that ITA erred in ignoring these increases, even though they took effect after the period of investigation. They contend that ITA's longstanding policy has been to use the most recent available information in determining the rate of cash deposits resulting from the FOMEX program.

While acknowledging that in the past ITA has taken into account program-wide changes occurring after the period under investigation but before the preliminary determination, defendant disputes the significance of such practice—

> It is true that the ITA has in certain cases adjusted the countervailing duty deposit rate to reflect program-wide changes which occurred before the preliminary determination. *See e.g. Certain Textile Mill Products from Peru,* 50 Fed. Reg. 9871 (1985). However, the ITA has not adopted a sweeping rule that is to be blindly applied whenever any modification takes place before a preliminary determination. Rather, these decisions are made on a case-by-case basis.

Defendant's Brief at 34.

Defendant's assertion here that deposit rates are only adjusted in certain cases, on a case-by-case basis, is not reflected in ITA's previously stated position that "it has long been the Department's policy to take program-wide changes into account where they are implemented after the period we investigate, but prior to a preliminary determination." *Certain Textile Mill Products from Peru,* 50 Fed. Reg. 9871, 9873 (Mar. 12, 1985) (final determination). *See also Certain Textile Mill Products from Peru,* 49 Fed. Reg. 49678, 49679 (Dec. 21, 1984) (preliminary determination); *Carbon Steel Plate from Brazil,* 48 Fed. Reg. 2568, 2570s & 2577 (Jan. 20, 1983) (final determination); *Litharge, Red Lead and Lead Stabilizer from Mexico,* 50 Fed. Reg. 36912 (Sept. 10, 1985) (preliminary results of administra-

[19] In fact, ITA was informed of these rate changes at the very start of its investigation. An appendix to the countervailing duty petition contained a copy of the Government of Mexico's letter of June 22, 1984, to ITA, informing it of the April 1984 FOMEX interest rate increases. P.R. 1. This same letter was attached to the Government of Mexico's response. P.R. 36 at Exhibit I.

tive review); and *Portland Hydraulic Cement from Mexico,* 50 Fed. Reg. 51732, 51735 (Dec. 19, 1985) (final results of administrative review). While ITA has discretion to shape its own long-standing policies and limit the circumstances to which they will apply, it must not apply such policies arbitrarily.

ITA based its decision not to apply its long-standing policy in this case upon the nature of FOMEX loans programs at issue and verifiability of information.

> We attempt to take into account program-wide changes that occur prior to our preliminary determination when changes can be verified. However, for certain types of programs this is not always possible. The effects of modifications in short-term loan programs are not easily quantified, nor do they occur immediately. In this case, the verified companies were unable to provide sufficient information to substantiate the claim that the textile companies use the new FOMEX interest rates. Thus, we used the interest rates supplied to us by the Mexican government for the period of investigation, 1983.

50 Fed. Reg. at 10829. In addition, defendant notes that the nature of the FOMEX loans at issue is such that "there was no indication that the more recent rates would remain constant, an unlikely prospect given past fluctuations and variations in the rates of FOMEX financing." Defendant's Brief at 35.

ITA does not provide any basis for distinguishing its disregard of the April 1984 changes in FOMEX interest rates in this case, from its consideration of those very same changes in other cases. In the *Portland* and *Litharge* cases, ITA addressed the issue of interest rate changes in FOMEX pre-export and export (short-term) loans which occur beyond the period under review.[20] ITA was presented in those cases, as it was in this case, with periods of investigation which did not extend beyond 1983, as well as with the same April 1984 FOMEX interest rate changes which occurred prior to its preliminary publications in 1985. *See Portland Hydraulic Cement and Cement Clinker from Mexico,* 50 Fed. Reg. 27476 (July 3, 1985) (preliminary results of administrative review); *Litharge* 50 Fed. Reg. 36912. In the *Portland* and *Litharge* cases, unlike this case, ITA used the April 1984 interest rates. *Portland,* 50 Fed. Reg. at 24747; *Litharge,* 50 Fed. Reg. at 36912. ITA expressed no difficulty in quantifying the effects of the April 1984 modifications in FOMEX pre-export and export (short-term) loans in the *Portland* and *Litharge* preliminary reviews.

Defendant's belated concern with fluctuations and variations in FOMEX interest rates does not reflect ITA's initial position in either this case or its position in the *Portland* and *Litharge* cases. When it informed ITA of the April 1984 changes in FOMEX inter-

[20] While *Portland* and *Litharge* involved program changes that occurred after the review period in a section 751 administrative review, ITA treats such changes in the same manner as it treats program changes that occur after the period of investigation in initial determinations. *See Carbon Steel Plate from Brazil,* 48 Fed. Reg. 2568, 2577 (Jan. 20, 1983) (final determination).

est rates, the Government of Mexico stated that these rates were to be reviewed every three months. P.R. 36, Exhibit I. These rates did not, in fact, remain constant, nevertheless, in other cases ITA repeatedly applied the latest rates without expressing any concern over their variations and fluctuations. When FOMEX interest rates changed again in October of 1984, ITA merely incorporated these newer rates into its final results of the 1983 review in *Portland.* 50 Fed. Reg. at 51735. In September of 1985 FOMEX interest rates changed still another time, but ITA continued to follow its longstanding policy and incorporated these newest rates into the final results of the 1983 review in *Litharge. Litharge, Red Lead and Lead Stabilizers from Mexico,* 51 Fed. Reg. 6450, 6451 (Feb. 24, 1986) (final results of administrative review).

The fact that "the verified companies were unable to substantiate the claim that the textile companies use the new FOMEX interest rates" in this case is not compelling. As a preliminary matter, it is FOMEX, rather than any individual recipient of FOMEX loans, who determines the applicable rates. In any event, it appears that it was ITA's own decision to limit the investigation to 1983, coupled with its failure to verify any 1984 figures, even for the limited purpose of substantiating the new rates, which precluded verification of the April 1984 rates.

ITA had every opportunity to verify the April 1984 FOMEX interest rates. It was informed early on of those changes by the petitioner, by the Government of Mexico, and by individual producers. When ITA conducted its verification at FOMEX, the April 1984 FOMEX interest rates were once again brought to ITA's attention. C.R. 13 (Verification of Mexican Government Responses). ITA's verification reports contain numerous references to 1983 loan documents, but are silent regarding any attempt to review 1984 loan documents and substantiate the April 1984 rates. C.R. 13.

Although it is clear that ITA may vary its practices based upon the requirements of particular cases, where the practice is an established one, and no reason is apparent for deviation from the practice, the action cannot be sustained.

IV. Calculation of a Country-Wide Countervailing Duty Rate for FOMEX Loans

ITA's final affirmative determination and order set forth a single country-wide countervailing duty deposit rate. This rate applies to over 2,000 textile firms, 95% of which are small or medium sized. The Government of Mexico initially gave ITA a list of 27 firms representing 85% of the exports to the United States. ITA focused its investigation on 22 of the 27 firms.[21] Six of the 22 firms, as well as

[21] Five of the 27 companies produced products which were removed from the class covered by the scope of ITA's investigation. One company produced yarns which were already subject to a suspension agreement in a previous countervailing duty determination. 50 Fed. Reg. at 302 and Defendant's Brief at 36. Two companies did not export the subject merchandise to the U.S. during the period of review, and another two produced products which were not within the scope of the petition as amended. Defendant's Brief at 36.

seven others, made timely applications for, and received, exclusion from ITA's order.

According to defendant, ITA intended to calculate the country-wide rate by taking the benefits received by 16 non-excluded firms and dividing them by the total exports to the United States of those same 16 non-excluded firms. This was not done. Defendant concedes that ITA erroneously divided the benefits of those 16 firms by the exports of only eight firms, and that one of those eight firms had been removed from the scope of the petition at the request of petitioners. Defendant requests a remand for the purpose of correcting these errors.

Plaintiffs argue that if ITA uses a single country-wide rate, it must do so in a reasonable manner, and that equity requires that it take into account the exports of all, not just 16, of the firms at issue. Plaintiffs contend that the benefits figure used by ITA captures almost the totality of FOMEX benefits received on a country-wide basis, but argue that the exports figure represents only about 40% of the total value of exports to the United States of textiles subject to ITA's investigation. Plaintiffs' Brief at 39 and Plaintiffs' Reply at 12.

A. Basing a Country-Wide Rate Upon Total Benefits and Total Exports

It has been ITA's long-standing practice to use country-wide rates, rather than company specific rates, where at all possible. *See, e.g., Ceramic Tile from Mexico,* 47 Fed. Reg. 20012, 20013 (May 10, 1982). This practice has been endorsed by Congress in enacting a legislative presumption in favor of country-wide rates, 19 U.S.C. § 1671e(a)(2) (Supp. III 1985),[22] and upheld by this court. *Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT ——, ——, 636 F. Supp. 961, 968 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987).

Given the number of firms which are subject to the order at issue, it is apparent that ITA's resources would not permit it to establish a company specific rate for each firm. ITA's resources also would be strained to unacceptable levels if it had to investigate each and evey firm in order to calculate a single country-wide rate. This does not mean necessarily that ITA cannot calculate a single country-wide rate which is derived from a fair average of the aggregate benefits and exports of every firm potentially subject to ITA's order. In this case, a national average might be calculated by dividing the total

[22] The statute was amended to provide that countervailing duty orders

> (2) shall presumptively apply to all merchandise of such class or kind exported from the country investigated, except that if—
>
> (A) the administering authority determines that there is a significant differential between companies receiving subsidy benefits, or
>
> (B) A State-owned enterprise is involved,
>
> the order may provide for differing countervailing duties * * *

19 U.S.C. § 1671e(a)(2) (Supp. III 1985). The Conference Report to the Trade and Tariff Act of 1984 explained that

> [t]his provision is intended to lessen the administrative burden on the administrative authority stemming from implementing company-specific rates. The amendment continues to permit individual company rates for significant differences in benefits. The administering authority is expected to determine under what conditions company-specific rates are appropriate when one of the requirements of paragraph 2 are met.

H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 180, *reprinted in* 1984 U.S. Code Cong. & Ad. News 5220, 5297.

value of FOMEX benefits granted to the firms at issue, if that figure is known or is reasonably determinable, by the total value of exports to the United States.

It is apparent that ITA had ready access to information on all FOMEX loans and all exports to the United States of the textiles at issue. In its verification of the Mexican Government's responses, ITA "looked at a computer print-out of all FOMEX loans to all companies during calendar year 1983." P.R. 113 and C.R. 13 (Verification of Mexican Government). ITA also had figures for the total value of exports to the United States of the products under investigation. P.R. 71 (memo accompanying preliminary affirmative determination).

It is not so clear, however, whether ITA's benefits figure is actually based upon all FOMEX loans used for United States exports of the textiles at issue. In its final determination, ITA stated that "Because FOMEX loans are export-related and we had data on all FOMEX loans to the United States, we allocated the benefit of the companies who actually received FOMEX financing over the exports to the United States of the 15 major exporters." 50 Fed. Reg. at 10825. But defendant also states:

> The Department considered only the benefits received by major exporters, restricting its verification at the offices of the government only to those firms and the eleven other companies which had requested exclusion. Thus, the rate established by ITA's final determination is only *representative* of the amount of benefits received throughout the country, and it is impossible to know the level of benefits received by the other producers.

Defendant's Brief at 39.

If ITA did in fact capture the total value of all of the benefits bestowed by FOMEX loans on exports of textiles to the United States, then a reasonable approach would be to divide that total by the total value of all of the relevant textile exports to the United States. Because the country-wide rate is to be applied to non-investigated companies, the fact that the total FOMEX benefits at issue may have been received by only a handful of firms does not alter the need to divide those benefits by the total exports of all 2,000 firms in order to arrive at an approximate national average. Thus, if the 16 nonexcluded firms received all of the FOMEX benefits at issue, ITA's approach of dividing those benefits by the exports of those same 16 firms is unreasonable in that it will not yield a national average rate for all 2,000 firms, but rather, it will only yield an average rate for those 16 firms.

On remand, ITA should explain whether it has in fact captured all of the FOMEX benefits at issue. If it has, in order to arrive at one representative rate it should compare those benefits to the total exports of the approximately 2,000 firms producing and exporting the textiles at issue. If ITA has not captured, or cannot verify that it has captured, all FOMEX benefits at issue, it should explain the

difficulty and use a reasonable alternate method of calculating one widely applicable deposit rate. If total benefits cannot be known, one reasonable alternative or part of a reasonable alternative may be to calculate a country-wide rate from a representative sample.

B. Basing a Country-Wide Rate Upon a Representative Sample of Firms

Plaintiffs have not specifically challenged, either here or at the administrative level, the issue of whether ITA may base its country-wide rate upon a sample of firms.[23] They argue, however, that "[i]f ITA's workload requires the use of a country-wide rate, then it should include in the calculation of benefits the exports of all companies on which it had data, or at least it should use a two-tier rate." Plaintiffs Reply at 14.

Defendant argues that ITA does not intend, upon remand, "to include in its recalculation of the benefit received from FOMEX loans any consideration of the firms who requested and received exclusions from the scope of the countervailing duty order because they received no more than *de minimis* subsidies." Defendant's Brief at 38. Defendant acknowledges that although "the sole source of authority rests in [ITA] Regulations, at [19 C.F.R.] section 355.38," that section "is silent with respect to whether excluded firms should be included in the basis upon which the deposit rate is determined." Defendant's Brief at 40. Defendant reasons that

> The Department's decision not to use the excluded firms' exports in the denominator of the FOMEX loan calculations is consistent with its normal practice, and the practice is based upon reasonable considerations. It is the Department's usual practice to remove from the calculations of country-wide countervailing duty rates any consideration of either the subsidies or production and exportation of firms which are excluded from that determination.

Id. at 40–41. The rationale for this practice, according to defendant, is that excluded firms are, in essence, receiving a " 'negative rate' or a rate of zero," while the nonexcluded firms, who "are either actually or presumably being subsidized at a rate above *de minimis*" receive a country-wide " 'affirmative' rate." *Id.* at 41.

Defendant provides no citations to any source which might shed light upon the existence, specific nature, or scope, of ITA's "usual practice." In any event, the facts of this case argue against the application of what might otherwise be a reasonable practice of disregarding excluded firms in arriving at a country-wide rate.[24] In this

[23] ITA has attempted to justify its decision not to investigate all of the firms in this case by citing to its final negative determination in *Certain Textile Mill Products and Apparel from Malaysia*, 50 Fed. Reg. 9852, 9854–56 (March 12, 1985). 50 Fed. Reg. at 10825. Apparently, the only criteria it applies is that the firms investigated account for at least 60 percent of the merchandise in question.

While the 26 firms that ITA investigated initially appeared to account for 60 percent of the textiles at issue, two of those firms, and their products, were excluded from the scope of ITA's investigation. Thus, if 60 percent is a proper threshold for investigation of products of the class to be affected, it likely has not been met.

[24] In *Ceramica* the court found that it was reasonable for ITA to use a country-wide rate which excluded firms that received no countervailable subsidy. 636 F. Supp. at 968. In that case, however, ITA was concerned with a subsidy program

Continued

case, ITA is basing its country-wide rate upon a relatively small sampling of firms and applying it to thousands of firms that were never actually investigated. By definition, this country-wide rate must bear some relation to an approximate average rate for all 2,000 firms.

As defendant's analysis indicates, ITA's action amounts to the adoption, in effect, of two separate rates, basing the "negative" rate upon the six excluded firms and the "affirmative" rate upon the remaining 16 investigated firms. This might pose little problem in an industry composed of only 22 investigated firms. In this case, however, these 22 firms constitute a sample of an industry composed of some 2,000 firms.[25] ITA has provided no basis for concluding that either the "affirmative" rate or the "negative" rate is more representative of the total industry. By adopting the "affirmative" sample rate, and disregarding the "negative" sample rate, for the purpose of determining a single country-wide rate for this industry, ITA has undermined the representativeness of its country-wide rate.[26] Under all of the circumstances of this case, it is unreasonable for ITA to exclude certain investigated firms, which did not receive greater than *de minimis* benefits, from the sample upon which a representative country-wide rate might be based.

C. Accounting for Material or Substantial Differences in Benefits

Plaintiffs argue that only five firms made extensive use of FOMEX benefits while the remaining investigated firms only received *de minimis* or small benefits. Plaintiffs note that ITA's regulations require it to take material differences into account, and submit that ITA erred in failing to establish a two-tier rate in this case.

Defendant argues that ITA properly refused plaintiff's request to establish a two-tier rate because it found that the levels of benefits

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that bestowed benefits in an amount equal to a percentage of the value of exported merchandise. Thus, the subsidy rate was the same for each firm that received benefits. That rate did not reflect the fact that certain firms did not apply for and receive any benefits. ITA provided, however, for a certification process that would allow such firms to receive a zero rate (even though they had not made timely applications for exclusion from ITA's order pursuant to 19 C.F.R. § 355.38). *See, e.g.*, 636 F. Supp. at 965.

[25] Plaintiffs have not challenged the representativeness of the sample with which the ITA began and the court merely assumes that the sample was not unreasonably unrepresentative. It may be, however, that ITA began with a sample that was in fact unrepresentative. For example, by limiting its investigation to a few dozen of the largest firms in an industry which was largely made up of small to medium sized firms, ITA was able to use its resources to account for a larger percentage of exports. To the extent that subsidies are utilized at different rates, for whatever reason, depending upon firm size, ITA may have chosen a sample that was inherently unrepresentative.

Apparently, ITA is under th erroneous impression that it need not be concerned with the representativeness of its samples. *See* 50 Fed. Reg. at 9855 ("The Department has not 'assumed' anything regarding the 40 percent of exports not covered by its questionnaires. All the Department sought to do was to ensure accurate subsidy rates for the covered exports."). While ITA's sample might not have to meet the rigors of statistical sampling techniques, it must use the means reasonably available to it to avoid samples that are unrepresentative.

[26] Plaintiffs argue that ITA has "captured almost the totality of all FOMEX benefits received on a country-wide basis." Plaintiffs' Brief at 39. The government's position has been equivocal. *Compare* P.R. 114 at 23 (ITA questioned petitioners as to whether there is "any basis in fact for proposition that the smaller [uninvestigated] companies in fact receive subsidization," and characterized petitioners' hypothetical response as indicating that "there is no basis.") *and* 50 Fed. Reg. at 10625 (ITA stated in its final determination that "we allocated the benefit of the companies who actually received FOMEX financing over the exports to the United States of the 15 major exporters.") *with* Defendant's Brief at 39 (the rate "is only representative of the amount of benefits received throughout the country, and it is impossible to know the level of benefits received by the other producers).

If plaintiffs' allegation is true, then it appears that the "negative" or "zero" rate would be more representative of the large number of small uninvestigated firms than the higher "affirmative" rate. In any case, even defendant seems to assume that under its methods the higher "affirmative" rate will be applied to some uninvestigated firms which are not receiving any subsidization. Defendant's Brief at 41. It seems particularly unlikely in this case that many of those eligible for exclusion actually sought it. In addition, in this case eligibility for exclusion does not cure the unfairness of imposition of an excessive rate on those receiving benefits slightly above the *de minimis* level.

were not significantly different and quotes ITA's final determination in support:

> Section 355.33 of the Commerce regulations provides that when separate enterprises have received materially different benefits those differences shall be taken into account in a final countervailing duty determination. In light of the fact that the country-wide rate is only 3.7 percent, this condition is not satisfied, so we have declined to create a two tier rate. However, the 13 companies which made timely requests for exclusion and were verified as receiving no benefits above *de minimis* have been excluded.

50 Fed. Reg. at 10830. Defendant also cites 19 U.S.C. § 1671e(a) and concludes that ITA's "decision was clearly reasonable in light of the large number of Mexican textile exporters and the low 3.7% deposit rate." Defendant's Brief at 43.

ITA's regulation at 19 U.S.C. § 355.33 (1984) specifically provides for the making of final determinations, and states, *inter alia:*

> (f) *Contents of Final Determinations.* The final determination shall include conclusions with regard to all facts and issues of law considered material to the Determination. If the Determination is affirmative, the amount of the net subsidy shall be estimated and stated, and the nature of the subsidy determined. If separate enterprises have received materially different benefits, such differences shall be estimated and stated.

19 C.F.R. § 355.33(f). As noted earlier, the statute provides that "if—(a) the administering authority determines that there is a significant differential between companies receiving subsidy benefits * * * the order may provide for differing countervailing duties." 19 U.S.C. § 1671e(a)(2) (Supp. III 1985).

The statute and regulations do not specify what constitutes a material or significant difference, or exactly how the provision for differing countervailing duties is to be accomplished.[27] Rather, they provide that the difference is to be evaluated by comparing levels of benefits among companies, rather than by comparing a country-wide rate and the rate of subsidization of a particular company. *See* 19 U.S.C. § 1671e(a)(2) and 19 C.F.R. § 355.33(f). Apparently, ITA also interprets the statute to refer to the differences among company rates. *Certain Iron-Metal Castings from India,* 51 Fed. Reg. 45788, 45791 (Dec. 22, 1986) (Final Results of Administrative Review).

ITA explained its finding of no material differences in this case, however, in terms of the simple fact that the country-wide rate was 3.7%. The level of the country-wide rate has no bearing upon the question of whether the benefits received by individual companies were materially different from each other.

[27] ITA's position appears to be that "[w]here a company receives *de minimis* benefits, we consider that to be a 'significant differential' warranting company specific treatment under [the statute]." *Certain Stainless Steel Hollow Products from Sweden* 52 Fed. Reg. 5794, 5794 & 5801 (Feb. 26, 1987) (Final Determination) (finding the difference between .06 percent and 2.18 percent significant). *See, e.g. Ceramic Tile from Mexico,* 51 Fed. Reg. 20871, 20872 (June 9, 1986) (treating country-wide rate of 2.10 percent and separate zero rate as significant); *Portland Hydraulic Cement,* 50 Fed. Reg. 51732 (Dec. 19, 1985) (involving zero rate for five firms and 3.28 to 3.50 percent for all others). To the differences as slight as a *de minimis* benefit .49 percent and a positive benefit of .50 percent in this case, the court finds this position arbitrary.

Defendant provides a *post hoc* explanation for ITA's finding based upon the large number of firms at issue. The court agrees that as the number of firms increases, it may be reasonable for ITA to apply a greater threshold in determining whether differences among companies should trigger varying rates. In this case, however, there is no indication that ITA considered in any manner the differences among companies.

Upon remand, if ITA finds that the benefits received by investigated companies in this case are materially or significantly different from each other, "such differences shall be estimated and stated," as required by 19 C.F.R. § 355.33(f) and ITA's "order may provide for differing countervailing duties," as provided at 19 U.S.C. § 1671e(a)(2). Depending upon the actual rates calculated and other circumstances it may be appropriate to establish one representative country-wide rate. It also may be appropriate to use company specific rates in combination with a representative rate, it may be appropriate to use tiered rates, or it may be appropriate to use some method which allows for qualification for a zero rate. The court is not in a position to decide what is administratively feasible. It does find, however, that the method chosen thus far, that is, use of one unrepresentative rate, is neither reasonable nor in accordance with law.

The court grants defendant's request to remand this case to ITA for correction of acknowledged errors and further orders that the proceeding on remand and the resulting determination shall be in accord with this decision. ITA shall report its results in 45 days.

SO ORDERED.

(Slip Op. 87–114)

HERCULES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, SOCIETE NATIONALE DES POUDRES ET EXPLOSIFS, DEFENDANT-INTERVENOR

Court Nos. 83–07–00951, 83–07–01075, 83–09–01324, and 83–09–01325

Before CARMAN, *Judge.*

[All motions denied. All actions dismissed.]

(Decided October 20, 1987)

Dow, Lohnes & Albertson, (William Silverman, John C. Jost, Margaret B. Dardess, and James M. McElfish, Jr., on the motions) for the plaintiff and defendant-intervenor Hercules, Inc.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*J. Kevin Horgan,* on the motions); Office of the Assistant General Counsel for Import Administra-

tion, U.S. Department of Commerce (*Eileen P. Shannon,* on the motions); and Office of the General Counsel, U.S. International Trade Commission (*Randi S. Field,* on the motions) for the defendant.

Busby, Rehm & Leonard, P.C., (*Will E. Leonard, James Taylor, Jr., Ruth Bale Lippincott and L. Daniel Mullaney,* on the motions) for plaintiff and defendant-intervenor Societe Nationale des Poudres et Explosifs.

Memorandum Opinion

Carman, *Judge:* Before the Court are four related cases arising out of the importation of industrial nitrocellulose from France. These cases result from challenges by both the domestic producer and the importer of antidumping and the countervailing duty determinations.

In Court No. 83–07–00951 (CV2D 951), the domestic producer of industrial nitrocellulose, Hercules, Inc. (Hercules), moves pursuant to Rule 56.1 of the Rules of this Court for judgment upon the agency record challenging a portion of the countervailing duty findings of the United States Department of Commerce, International Trade Administration (Commerce) in *Final Affirmative Countervailing Duty Determination; Industrial Nitrocellulose From France,* 48 Fed. Reg. 11,971 (1983), *amended, Industrial Nitrocellulose From France; Amendment to Notice of Final Affirmative Countervailing Duty Determination,* 48 Fed. Reg. 25,254 (1983) (*Final CVD Determination*). In its second action, Court No. 83–09–01324 (LTFV 1324), Hercules moves for judgment upon the agency record challenging a portion of the less than fair value findings of Commerce in *Final Determination of Sales at Less Than Fair Value; Industrial Nitrocellulose from France,* 48 Fed. Reg. 21,615 (1983) (*Final LTFV Determination*).

The foreign producer and exporter of industrial nitrocellulose from France, Societe Nationale des Poudres et Explosifs (SNPE) has filed with this Court its Rule 56.1 motion challenging, in Court No. 83–07–01075 (CVD 1075), the same countervailing duty determination challenged by Hercules, *Final CVD Determination.* In this action, SNPE also challenges the injury determination of the United States International Trade Commission (ITC). Similarly, in Court No. 83–09–01325 (LTFV 1325), SNPE moves for judgment upon the agency record challenging the same less than fair value dumping investigation, *Final LTFV Determination,* challenged by Hercules in LTFV 1324. In addition, SNPE challenges the ITC injury determination in LTFV 1325.

I. Background

Industrial nitrocellulose (INC), the subject of the investigations, is a dry, white, amorphous, synthetic chemical which results from the action of nitric acid on cellulose and is extremely flammable. Industrial nitrocellulose contains between 10.8% and 12.2% nitrogen, differentiating it from explosive grades of nitrocellulose, which contain over 12.2% nitrogen. INC is stored and shipped wet with alco-

hol. Industrial nitrocellulose comes in several viscosities and is used in the production of lacquers, films, coatings, furniture finishes, and printing inks. The product has been classified as cellulosic plastic materials, other than cellulose ascetate, under item 445.2500 of the Tariff Schedules of the United States (TSUS). Explosive grade nitrocellulose has a different classification under the TSUS. At the time of the investigation, SNPE was the sole French producer and exporter of INC to the United States. Since 1978, Hercules was the sole United States producer of INC.

Prior to the creation of SNPE, the French Government had historically maintained a monopoly over trade in powders and explosives which extended to industrial nitrocellulose, a co-product of explosive grade nitrocellulose. The monopoly was operated by the Ministry of Defense through Service des Poudres (SP), one of the Ministry's divisions. Pursuant to the Treaty of Rome which established the European Economic Community (EEC) and in response to its treaty obligations, the French Government transferred, in exchange for stock, the commercial and industrial assets and operations of SP to SNPE, a newly formed public corporation. The French Government received over 99% of the outstanding stock of SNPE.

At the time of SNPE's incorporation, pursuant to French law, the employment of all military and civilian personnel of SNPE's predecessor, SP, was at the disposal of the president of SNPE. After a period of one year, these employees were permitted to be either placed again at the disposal of the Minister of Defense or recruited by SNPE in accordance with French labor laws. Employees with civil service status who remained with SNPE had the option of retaining that status and continuing to be subject to the conditions applicable to any facility under the jurisdiction of the Ministry of National Defense. Some employees continued to retain civil service status; however, all newly hired employees were not given this status.

II. The Countervailing Duty Investigation

A. *Introduction*

On September 14, 1982, Hercules filed a countervailing duty petition with Commerce and the ITC alleging subsidies were being provided to French producers of INC by the Government of France (GOF). Hercules also alleged the United States INC industry was materially injured, or was threatened with material injury, by reason of imports of INC from France. On September 17, 1982, upon notification from Commerce, the ITC instituted a preliminary countervailing duty investigation of INC from France.[1] On October 4, 1982, Commerce instituted a preliminary countervailing duty investigation. *Initiation of Countervailing Duty Investigation; Industrial Nitrocellulose From France,* 47 Fed. Reg. 44,807 (1982).

[1] Because France is a "country under the Agreement" within the meaning of Section 701(b) of the Tariff Act of 1930, as amended, 19 U.S.C. 1671(a) (1981), an injury determination was required by the ITC for this investigation.

The ITC issued an affirmative preliminary determination, on October 29, 1982. *Nitrocellulose From France; Determination,* 47 Fed. Reg. 51,024 (1982). The ITC determined there was a reasonable indication imports of INC from France were materially injuring, or threatening to materially injure, a U.S. industry. The vote of the Commission making the determination was unanimous.

On December 8, 1982, Commerce, at Hercules' request, declared the investigation "extraordinarily complicated," as defined in section 703(c) of the Tariff Act of 1930 (the Act), as amended, 19 U.S.C. 1671b(c)(1981), and extended the deadline for the preliminary determination from December 8, 1982 to December 22, 1982. Commerce made a negative preliminary determination on December 22, 1982, stating the Government of France was providing SNPE with certain benefits constituting subsidies within the meaning of the Act. However, the estimated *ad valorem* amount of the net subsidies was found to be *de minimis. Preliminary Negative Countervailing Duty Determination; Industrial Nitrocellulose From France,* 47 Fed. Reg. 58,330 (1982).

Commerce made a final affirmative countervailing duty determination on March 14, 1983. *Final CVD Determination.* Commerce found "certain benefits which constitute subsidies within the meaning of the countervailing [sic] duty law [were] being provided to [SNPE] * * * [at] [t]he estimated net subsidy [of] 3.248 percent *ad valorem.*" 48 Fed. Reg. at 11,971. The 3.248 figure, however, was amended to 3.604 on June 6, 1983. 48 Fed. Reg. 25,254.

Commerce, in its final determination, found the following benefits constituted countervailable subsidies:

(1) A grant from the Ministry of Defense to SNPE for plant modernization at Bergerac;
(2) Cross-subsidization of industrial nitrocellulose through military sales of nitrocellulose;
(3) Assumption of certain labor costs by the Government of France; and
(4) Tax and non-tax regional development incentives.

The ITA determined the following programs did not confer subsidies:

(1) The reorganization of the explosive powders and substances industry, pursuant to the Treaty of Rome, by creating SNPE;
(2) Equity infusions;
(3) Financing from Credit National;
(4) Research and development funding;
(5) Energy conservation grants;
(6) Labor assistance programs;
(7) Anti-pollution incentives;
(8) Local business tax reductions;
(9) Equipment subsidies; and
(10) Input discounts.

Finally, the ITA determined that certain other government programs were not used by the French nitrocellulose producer.[2]

In accordance with 19 U.S.C. § 1671d, the ITC had 75 days after Commerce's affirmative final determination to determine whether or not the imports were materially injuring or threatening to materially injure a U.S. industry. On March 22, 1983, the ITC instituted a final countervailing duty investigation of INC from France. *Nitrocellulose From France,* 48 Fed. Reg. 15,018 (1983). On June 15, 1983, the Commission transmitted its affirmative final countervailing duty determination and report to Commerce finding a U.S. industry was materially injured by imports of INC. *Nitrocellulose From France,* 48 Fed. Reg. 27,453 (1983). The vote of the Commission was 2 to 1, with Commissioner Stern dissenting. Thereafter, on June 22, 1983, notification of Commerce's countervailing duty order was published in the Federal Register. *Industrial Nitrocellulose From France; Countervailing Duty Order,* 48 Fed. Reg. 28,521 (1983).

Hercules initiated an action seeking judicial review of Commerce's countervailing duty order, CVD 951, on June 29, 1983. SNPE followed by filing an action challenging both Commerce's countervailing duty order and the ITC's injury determination, on August 19, 1983.

B. *Contentions of the Parties in Court No. 83–07–00951.*

In this case Hercules, the plaintiff domestic producer, contends the following:

> (1) Commerce erred in utilizing an equity methodology rather than a grant methodology to calculate the cross-subsidization of industrial nitrocellulose sales by military nitrocellulose sales;
> (2) Commerce incorrectly determined that the creation of SNPE and its modernization were consistent with commercial considerations. Commerce also erred in finding the transfer of assets and funds by the French Government to SNPE in 1970 and subsequent years was not countervailable;
> (3) The finding by Commerce that the purchases by SNPE of inputs from suppliers were not countervailable subsidies, based upon the unsupported and unverified assumption that government controlled and subsidized suppliers would not pass along a portion of their subsidies to SNPE which was also government controlled, was unsupported by substantial evidence or otherwise not in accordance with law; and
> (4) The reliance by Commerce upon partial and preselected verified information supplied by SNPE or the government of France following the refusal by SNPE or the government of France to supply all the information required by Commerce was contrary to the requirements of section 776 of the Act

[2] Commerce determined the following programs were not used by SNPE:
(1) FDES, a fund providing loans to businesses and corporations;
(2) CDC, loans from a government lending institution;
(3) FASAI, a program intended to encourage job creation and industrial diversification;
(4) Loan guarantees;
(5) FNE, a program offering vocational training, and relocation and early retirement allowances; and
(6) Government retirement and layoff benefits.
48 Fed. Reg. at 11,975–76.

which requires Commerce to use the best information otherwise available.

The United States defends its determination as follows:

(1) The calculations employed by Commerce of the cross-subsidization of the production of industrial nitrocellulose by the French Government's purchase of military nitrocellulose at excessive prices was reasonable and in accordance with law in light of the best information available;
(2) The formation of SNPE by the transfer of assets by the French Government to SNPE in exchange for stock on terms consistent with commercial considerations did not constitute a subsidy;
(3) The determination by Commerce that the purchase of inputs from government owned companies did not constitute a countervailable benefit to SNPE was supported by substantial evidence on the record and was otherwise in accordance with law; and
(4) Commerce based its final determination upon information that was verified upon the best information otherwise available in conformity with the countervailing duty laws and regulations of the Department of Commerce.

Defendant-intervenor SNPE generally concurs with the contentions of the defendant United States.

C. *Contentions of the Parties in Court No. 83–07–01075*

Plaintiff SNPE, the foreign producer, contends the following:

(1) The finding by Commerce that the production of industrial nitrocellulose was cross-subsidized by military sales is unsupported by substantial evidence on the record and is otherwise not in accordance with law for the following reasons:

A. The theory of cross-subsidization was contrary to the intent of Congress;
B. This theory is also contrary to established and sound administrative practice;
C. Commerce was in error when it found military sales were at premium or excess prices;
D. Commerce was in error in assuming a benefit was conferred on INC where INC operations were assumed to be unprofitable;
E. Commerce adopted the theory of cross-subsidization because of political pressure; and
F. The methodology of Commerce did not represent or adequately estimate the amount of any subsidy.

(2) Commerce's determination that the French law permitting government workers at SNPE to retain government status conferred a countervailable subsidy is unsupported by substantial evidence on the record and is otherwise not in accordance with law;
(3) The finding by Commerce that the funds received from the Ministry of Defense of France to upgrade SNPE's pyrotechnical

safety equipment were countervailable is unsupported by substantial evidence on the record and is otherwise not in accordance with law; and
(4) The finding by Commerce that DATAR Regional Assistance was countervailable is unsupported by substantial evidence on the record and is otherwise not in accordance with law.

SNPE, the foreign producer, also challenges the ITC's determination Hercules was materially injured prior to 1982 by reason of French imports. SNPE contends this decision is unsupported by substantial evidence on the record and is otherwise not in accordance with the law.

Defendant United States counters SNPE's arguments as follows:

(1) The subsidy conferred upon SNPE by the assumption by the Government of France of certain labor costs for employees with civil service status should not be offset by the higher cost of wages of employees with civil service status. Moreover, the Court should not consider the merits of SNPE's argument since it was not raised at the administrative level;
(2) Commerce correctly determined that the assistance provided to SNPE through DATAR constituted a countervailable subsidy because the benefits were conferred upon a regional basis and were therefore preferential. In any event the Court should not consider the merits of SNPE's argument since it was not raised at the administrative level;
(3) Funds received by SNPE from the French Ministry of Defense for the purchase of pyrotechnical safety equipment constituted a countervailable subsidy; and
(4) The determination by Commerce that the government of France was subsidizing the production of industrial nitrocellulose by paying excessive prices for military nitrocellulose was reasonable and in accordance with law, was based upon the best information available, and was properly calculated. Defendant United States further indicates the administrative record does not support SNPE's allegation Commerce's decision was the result of political pressure.

As to the determination of the ITC, defendant United States argues there is substantial evidence on the record supporting the Commission's determination that the domestic nitrocellulose industry was materially injured.

Defendant-intervenor Hercules contends the determination that the military nitrocellulose sales by SNPE subsidized the production and export of industrial nitrocellulose was supported by substantial evidence on the record and was otherwise in accordance with law. Defendant-intervenor further contends there is substantial evidence on the record of decreased production, shipments, and employment to support the Commission's finding that a domestic industry, *i.e.* Hercules, suffered material injury on account of the imports from France.

D. *Discussion*

1. *Introduction*

The Secretary of Commerce has been entrusted with the authority and responsibility for administering the countervailing duty law. In this capacity, the Secretary is vested with broad discretion. *Smith Corona Group* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

The countervailing duty law[3] provides if Commerce finds a foreign government or entity is subsidizing the manufacture, production, or exportation of goods imported into the United States, and where required, the ITC issues an affirmative injury determination, then Commerce must impose countervailing duties on the goods equal to the amount of the subsidy.

The Court in reviewing the present action must sustain Commerce's countervailing duty determination unless it finds it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.A. § 1516a(b)(1)(B) (1982). It is also well settled that the administrative agency "has broad discretion in the enforcement of the trade laws and * * * [its] 'decision does not depend on the "weight" of the evidence, but rather on [its] expert judgment * * * based on the evidence of the record.' " *Manufacturas Industriales de Nogales, S.A.* v. *United States,* —— CIT ——, ——, Slip. Op. 87–87 at 9 (July 24, 1987) (quoting *Matsushita Electric Industrial Co.* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984).

The "substantial evidence test" restricts the scope of the Court's review of the agency record. Much deference is given to the agency's interpretation. As long as the interpretation is sufficiently reasonable, it will be upheld. Furthermore, it need not be the only reasonable interpretation. *Atcor, Inc.* v. *United States,* —— CIT ——, ——, 658 F Supp. 295, 299 (1987). In arriving at a clear understanding of the meaning of "substantial evidence," it has been recognized:

> 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Substantial evidence 'is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'

Matsushita Electric Industrial Co. v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229, (1938); and quoting *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619 (1966) respectively).

2. *Court No. 83–07–00951*

In challenging Commerce's *Final CVD Determination,* plaintiff Hercules concurs with the determination that SNPE benefited from

[3] 19 U.S.C. §§ 1671 et seq. (1982).

certain subsidies bestowed by the Government of France (GOF), but disputes other findings of Commerce as not supported by substantial evidence on the record or not otherwise in accordance with law. Hercules first argues that, although Commerce was correct in finding sales of military nitrocellulose subsidized sales of industrial nitrocellulose, nevertheless, Commerce incorrectly calculated the *ad valorem* subsidy amounts. Hercules argues Commerce mischaracterized the subsidy as an equity infusion, rather than a grant. Hercules maintains no stock was issued for this subsidy, and therefore, Commerce should not have treated this subsidy as an equity infusion, but as a grant. Hercules continues:

> Even if the subsidy should be treated as an equity infusion, Commerce's methodology * * * is incorrect because (a) [it] is an unjustifiable deviation from Commerce's normal equity methodology * * *; (b) Commerce should have included in its measurement of the equity infusion * * * increases in its industrial nitrocellulose net working capital because the subsidy earned on SNPE's sales of military nitrocellulose could be used to acquire other industrial nitrocellulose assets in addition to fixed assets; and (c) Commerce should have assumed a negative, instead of * * * zero, rate of return on operations from industrial nitrocellulose * * *.

Plaintiff Hercules' Brief in Support of its Motion for Judgment upon the Administrative Record at 7–8, *Hercules, Inc.* v. *United States,* Court No. 83–07–00951, Joined Issue Calendar.

Commerce, on the other hand, contends its calculation of the subsidy was reasonable under the circumstances and in accordance with law. Both SNPE and the GOF refused to provide information about the sales of military nitrocellulose or profit and loss figures for the industrial nitrocellulose production to rebut Hercules' allegations concerning cross-subsidization. Commerce argues it had no other alternative but to assume the validity of cross-subsidization and employ an equity methodology utilizing the best information available[4] to calculate the subsidy derived from the GOF's payment of excessive prices for military nitrocellulose.

Commerce compared the company-wide rate of return for SNPE on equity with the rate of return on equity for industrial nitrocellulose. Commerce assumed the rate of return on equity for industrial nitrocellulose was zero as the best information available because SNPE and the GOF refused disclosure of the necessary information to construct this rate. The resultant differential between the compa-

[4] This rule provides as follows:

> (a) **General Rule.**—Except with respect to information the verification of which is waived under section 1673b(b)(2) of this title, the administering authority shall verify all information relied upon in making a final determination in an investigation. In publishing such a determination, the administering authority shall report the methods and procedures used to verify such information. If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its determination, which may include the information submitted in support of the petition.
>
> (b) **Determinations to be made on best information available.**—In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677(e) (1982)

ny-wide rate of return and rate of return for industrial nitrocellulose, which ultimately became the percentage rate of return for the entire company, was then applied to the amount of fixed assets purchased for the industrial nitrocellulose operations. This fixed assets figure, Commerce explains, was chosen as a substitute for equity infusions due to the impossibility Commerce had in determining and allocating the GOF's infusions of equity for the industrial nitrocellulose production. Commerce determined the subsidy rate by applying the formula to fixed assets over a ten-year average useful life period.

The Court does not agree Commerce's decision to use an equity method was not supported by substantial evidence on the record or was not otherwise in accordance with law. The GOF and SNPE provided limited information for Commerce to utilize in formulating a rate of subsidy. The equity methodology was chosen "because cash infusions by means of government purchases of military products at premium or 'excess' prices may, when such prices are paid to a wholly government-owned company, properly be viewed as infusions of equity." 48 Fed. Reg. at 11,973. Commerce asserts the unique facts of this investigation as well as the time constraints and limited information were crucial factors in the decision to choose this method.

Hercules' assertion the cross-subsidy was a grant is without merit. Commerce has explained its view of the difference between an equity purchase and a grant as follows:

> The essential difference between an equity purchase and the bestowal of a grant is the potential for return on equity. The domestic interested parties contend that the potential for any return on investment in these companies is minimal [sic] and therefore the Department should [sic] this difference in its treatment of equity infusions. Their argument focuses on the poor prospects for potential dividends at average rates, while ignoring the potential return in terms of retained earnings or increasing worth tof [sic] the company. Because we cannot discount this potential at the time the infusion is made, we should not treat equity infusions as an outright grant. To do so would raise the possibility of countervailing more than the net subsidy in cases where the government receives a return, in retained earnings or increasing worth from its investment.
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> * * * * * * *
>
> The treatment of equity infusions as grants * * * implies that the government could expect no return, in terms of dividends, retained earnings, or through increased worth, from its investment. We lack the ability to look into the future that would be necessary to make such a judgement [sic]. Because of the difference betwen [sic] equity purchases and grants, the treatment of equity infusions as grants is inappropriate. We believe that our 'rate of return shortfall methodology appropriately measures benefits from equity by an equity-based standard.

Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 49 Fed. Reg. 18,006, 18,022, (1984).

The GOF, owning over 99 percent of the outstanding stock of SNPE could receive potential returns in the form of retained earnings or increased worth of holdings from any profits generated by SNPE from alleged "excess" prices paid. From review of the record and in granting Commerce deference in the administration of the trade law, it is clear substantial evidence on the record supports Commerce's stance.

Neither does this Court concur with Hercules that Commerce was incorrect in the way it utilized its equity method in valuing the cross-subsidy. As discussed above, SNPE and the GOF refused to disclose certain information. The facts of the investigation were unique, and Commerce was confronted with constricting time limitations for verification. Commerce explained by letter, dated April 14, 1983, to counsel for Hercules, that it employed its equity method in a manner that "most accurately measures the [subsidy] benefit to the recipient." Record at 3475–76.

Hercules also urges Commerce was deficient in considering the amount of the equity infusions to be measured only by the fixed assets purchased by SNPE. Hercules claims "[t]his assumption does not take into account the fact that cash from the GOF *may be used* for other purposes necessary for the production of industrial nitrocelluose." Plaintiff Hercules' Brief in Support of its Motion for Judgment upon the Administration Record, *supra,* at 18 (emphasis added).

Commerce explains its rationale as follows:

> [We c]hose not to treat the total value of the assets purchased for INC production as the amount of subsidy from military sales, as suggested by Hercules, because in so doing [Commerce] would have grossly over-estimated the amount of the subsidy * * *. Hercules' suggested methodology assumes that *all* assets purchased for INC operations were paid for with funds from cross-subsidization. This in turn assumes that INC sales were not generating any revenues from which assets could be purchased. However, the assumptions inherent in Hercules' proposed methodology were not borne out by the other information available to [Commerce].

Defendant's Opposition to Plaintiff's Motion for Judgment upon the Agency Record at 18–19, *Hercules, Inc* v. *United States,* Court No. 83–07–00951, Joined Issue Calendar.

Clearly, it is within Commerce's "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council* v. *United States,* 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). Similarly, it was within Commerce's reasonable discretion to assume a negative, rather than a zero, rate of return on equity on

INC production when determining the cross-subsidization rate. Hercules claims Commerce erred by not considering and adopting the findings of the concurrent antidumping record as the best information available to establish the zero rate determination.

In the concurrent antidumping investigation, Commerce determined:

> For certain grades, we found that sufficient sales of industrial nitrocellulose were made at or above the cost of production and, therefore, those sales were used in making price-to-price comparisons with sales in the U.S. market. For certain other grades of industrial nitrocellulose, we found that sales which were made above the cost of production were inadequate as a basis for the determination of foreign market value * * *.

Final LTFV Determination, 48 Fed. Reg. at 21,615–16.

Here, Commerce's determination was based on evidence of below cost sales only in France; not all sales in France were below cost. In contrast, Commerce's determination in the countervailing duty investigation was based on SNPE's worldwide rate of return on INC production. Accordingly, the findings do not conclusively establish the overall rate of return on INC sales in France was negative. At the very least, there is no firm basis to assume the INC loss on French sales would augment a loss on INC overall operations, even if French sales were below cost. Commerce's assumption of a zero return rate as based on the best information otherwise available was a reasonable exercise of the agency's explicit statutory discretion.

Hercules' second major contention with Commerce's countervailing duty determination is that Commerce failed to characterize the GOF's creation of SNPE from SP as a legal fiction, failed to treat the transfer of assets from the one to the other as a countervailable subsidy, and erroneously determined both acts were consistent with commercial considerations. Hercules further complains Commerce failed to examine SP's books and records for proper valuation of the transferred assets.

Commerce's language in the Federal Register responds to this argument:

> The record in this case shows that SNPE was organized in response to binding directive that certain state monopolies be adjusted to operate on a competitive, commercial basis. Indeed we have discovered no evidence that the purpose or intent of the French Government was anything other than the commercialization of SP. Given that government ownership of a business is not a subsidy *per se*, the French Government's decision to fulfill its treaty obligations by 'spinning off' its industrial nitrocellulose operations does not, on its face, constitute subsidization of those operations.
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> * * * * * * *
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> In sum, viewing SNPE's industrial nitrocellulose operations within the context of the whole company, and in the larger con-

> text of the special circumstances of the company's creation, there is no evidence to suggest an intent to subsidize industrial production. To the contrary, the evidence we have gathered and verified supports the conclusion the French Government has no purpose other than the fulfillment of its treaty obligation to commercialize SP. Consequently, we conclude the creation of SNPE and the transfer of assets by which it was carried out did not take place on terms inconsistent with commercial consideration [sic] and, therefore did not give rise to countervailable benefits.

Final CVD Determination, 48 Fed. Reg. at 11,974.

Commerce's determination that the creation of SNPE was not a legal fiction, was consistent with commercial considerations, and did not constitute a countervailable subsidy is supported by substantial evidence on the record. The GOF's creation of SNPE from SP was in keeping with terms of its obligations under the Treaty of Rome, Article 37,[5] which calls for the commercial adjustment of any State monopoly to ensure against unfair trade discrimination among the member states. The GOF retained a majority shareholder status upon receiving value for the equity infusion of assets from SP to SNPE. Thus, the determination of Commerce was reasonable and supported by substantial evidence in the record that SP was transformed into a newly-formed public corporation to operate on a competitive basis consistent with commercial considerations and was not transformed to serve as a legal fiction.

Hercules further contends, in the alternative, if the creation of SNPE was not a legal fiction, then SNPE's creation and the GOF's transfer of assets were inconsistent with commercial considerations.

Commerce defends its position by asserting the GOF transferred assets from SP to SNPE in accordance with treaty obligations for creating a newly formed corporation. Commerce verified these assets were properly valued in accordance with generally-accepted accounting principles and commercial law and practice in France. Commerce found these equity infusions were consistent with commercial considerations as set forth at § 771(5)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5)(B)(i)[6] and that the GOF ex-

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[5] The Treaty of Rome, establishing the European Economic Community (EEC), requires its member states adhere to the following:

> [A]djust any State monopolies of a commercial character so as to ensure that * * * no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
>
> The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

The Treaty of Rome, Article 37, paragraph 1, March 25, 1957, 298 U.N.T.S. 11.

[6] This subsection provides as follows:

> (5) **Subsidy.**—The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes, but is not limited to, the following:
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> * * * * * * *
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> (B) the following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

19 U.S.C.A. § 1677(5)(B)(i) (1982).

ercised sound government investment policy by investing in a creditworthy company.

When Commerce finds certain transfers of assets provided by a foreign government are infusions of equity, then Commerce, pursuant to § 1677(5)(B)(i) must scrutinize these benefits to determine their consistency with commercial considerations. *See British Steel Corp.* v. *United States,* 9 CIT 85, 605 F. Supp. 286 (1985). The GOF, in creating SNPE, transferred commercial and industrial assets and operations of SP to SNPE in exchange for over 99 percent of the outstanding stock. 48 Fed. Reg. at 11,974. These equity infusions, by the GOF, were directed into an apparently healthy and sound enterprise, SNPE. Commerce scrutinized the decision of France to commercialize SP into SNPE, the latter of which has apparently maintained a profitable stance since its inception. Commerce summarizes its position as follows:

> Out treatment of government equity investment in a company *hinges essentially on the soundness of the investment.* If the government investment was reasonably sound at the time it was made, we do not consider it a subsidy. *If,* on the contrary, *the investment appears to have been unsound, a subsidy may exist.* Government investment confers a subsidy only when it is on terms inconsistent with commercial considerations.
>
> An equity subsidy potentially arises when the government makes equity infusions into a company which is sustaining deep or significant continuing losses and for which there does not appear to be any reasonable indication of a rapid recovery.

British Steel Corp., 9 CIT at 92, 605 F. Supp. at 291 (1985) (citing *Final Affirmative Countervailing Duty Determinations on Stainless Steel Sheet, Strip, and Plate From the United Kingdom,* 48 Fed. Reg. 19,048, 19,049 (1983) (emphasis added).

In the context of a government investment in a company sustaining deep or significant continuing losses, the equity infusion will be considered at the time of the government's investment. The important criterion to be considered is the *soundness* of the investment. In a situation where a new entity is created, there is no past record of a company's creditworthiness to examine. The crucial issue is whether or not the investment appears to be sound. Here, Commerce observed there was no "track record" of SP, the predecessor of SNPE, and no profit-and-loss statement to examine. Consequently, Commerce in light of the best information available examined the overall financial health of SNPE and its INC operations and found the GOF's creation of and investment in SNPE was a sound investment in a creditworthy company. Commerce explains its procedures as follows:

> To be "equityworthy," a company must show ability to generate a reasonable rate of return within a reasonable period of time. In making our equityworthiness determinations, we assess a company's current and past financial health, as reflected in

> various financial indicators taken from its financial statements, and where appropriate, internal accounts. We give great weight to the company's recent rate of return on equity as an indication of financial health and prospects. Like our creditworthiness test, our equityworthiness analysis also takes into account the company's prospects as reflected in market studies, country and industry forecasts, and project and loan appraisals, when these types of analyses are available.

Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina, 49 Fed. Reg. at 18,020.

There is substantial evidence in the record to support the finding by Commerce that the GOF's decision to create and invest equity in SNPE was consistent with commercial considerations. The discretionary power to make such a determination is vested in Commerce; this Court will not supplant its own expertise for that which is exercised by the agency.

Hercules' third area of dissatisfaction concerns Commerce's determination that SNPE's purchases of inputs from government-owned companies are not countervailable subsidies. Hercules also claims Commerce's manner of verification was deficient because Commerce did not conduct a thorough comparison of prices set by SNPE's input suppliers. These input suppliers were government-owned purveyors of electric power, gas, nitric acid, and oleum. Hercules contends subsidies are conferred upon SNPE when it purchases these inputs.

Commerce responds as follows:

> [the sale] of natural gas and electricity did not confer subsidies upon SNPE because [Commerce] had verified that the utility rates charged to SNPE were based upon a standard pricing formula which is applicable to all industrial users in the area of SNPE's nitrocellulose production facility. [Commerce] determined that there were no subsidies with respect to purchases of oleum or nitric acid because SNPE's suppliers of these commodities were privately owned by controlled during the period of investigation, and there was no evidence that the volume discounts obtained by SNPE were unduly favorable when compared with prices charged to other large volume buyers of these inputs.

Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, *supra,* at 3–4.

In its final determination, Commerce discussed the oleum and nitric acid purchases as follows:

> With respect to SNPE's purchases of oleum and nitric acid, we have verified that while the suppliers of these inputs are now owned by the government of France, during the period of investigation these companies were privately owned and controlled. Any countervailable benefits flowing to the company which occur outside the period for which we are measuring sub-

> sidization would be included in an annual review following any issuance of a countervailing duty order in this investigation.

Final CVD Determination, 48 Fed. Reg. at 11,975.

Nevertheless, Commerce performed a verification of these purchases by checking the documents presented setting forth the prices before and after nationalization and determined there were no changes to signify a subsidy.

Concerning the purchase of natural gas and electricity, Commerce employed an "arm's-length test" in its verification of the alleged subsidies from input suppliers. This arm's-length test is explained by Commerce, as follows:

> Benefits bestowed upon the manufacturer of an input do not flow down to the purchaser of that input, if the sale is transacted at arm's-length. In an arm's-length transaction the seller generally attempts to maximize its total revenue by charging as high a price and selling as large a volume as the market will bear * * *.
>
> * * * * * * *
>
> Where a subsidized coal producer and a steel producer are related companies, it is reasonable to question whether, in fact, the transfer price for coking coal is established on an arm's-length basis. In general, our tests for whether the prices for coking coal *charged to a related company* were established on an arm's-length basis include: (1) Whether the coal producer sold to its related steel producers at the prevailing price, and/or (2) whether the coal producers sold to its related steel producers and all other purchasers of coking coal at the same price.

Final Affirmative Countervailing Duty Determinations; Certain Steel Products From Belgium, 47 Fed. Reg. 39,304, 39,308, 39,324 (1982).

Hercules argues Commerce should have employed a different method of verification in this instance. Hercules urges a "comparison of prices" methodology should have been utilized.

The decision to select a particular methodology rests solely within Commerce's sound discretion. As long as there is "substantial evidence on the record" to support the choice, the Court will sustain the methodology chosen by Commerce. Thus, while Hercules proposes the Court choose an alternative method for verification, "[this C]ourt may not substitute its judgment for that of [Commerce] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* * * *.' " *Penntech Papers, Inc.* v. *NLRB,* 706 F.2d 18, 22 (1st Cir. 1983), *cert. denied,* 464 U.S. 892 (1983) (citing *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488 (1951).

Hercules further urges Commerce did not adequately verify the information submitted by SNPE establishing arm's-length transactions for the input purchases. The Court does not agree. When Com-

merce applies a reasonable standard to verify materials submitted and the verification is supported by such "relevant evidence as a reasonable mind might accept," the Court will not impose its own standard, superceding that of Commerce. *See Agrexco, Agricultural Export, Co., Ltd.* v. *United States,* 9 CIT 40, 47, 604 F. Supp. 1238, 1244 (1985). Commerce verified the utility rates charged to SNPE were based on standard pricing with respect to all industries in the region who use the utilities. Commerce did not find preferential pricing was afforded SNPE from the government-owned utility companies. Commerce examined the documents and other pertinent data submitted and concluded that SNPE's purchases were at arm's-length.

Hercules contends that Commerce erroneously interpreted and applied the "best information otherwise available" standard. According to Hercules, since the GOF and SNPE failed to provide pertinent or otherwise provided incomplete data, Commerce should have employed the "best information otherwise available." Furthermore, Hercules argues, Commerce should have drawn negative inferences from the failure to provide the date. Hercules challenges Commerce's action as contravening the language and intent of Section 776 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e.[7] Hercules concludes by asking the Court to order Commerce to draw adverse inferences from the GOF's refusal to supply complete information.

Commerce defends its verification procedure, maintaining it relied upon verified information. Where information was not verifiable, Commerce relied upon the "best information otherwise available," in conformity with the statute and regulations. Commerce argues it employed the usual verification procedure which included inspecting documents, SNPE's plant, operations, and records, and performing interviews. Commerce verified the information supplied by SNPE and the GOF in the questionnaires. As to the four alleged areas on unverified information, Commerce urges it received and verified sufficient information, to properly make its determination. Commerce contends the agency need not verify all information it receives. Rather, according to Commerce, only that information relied upon in making a determination must be verified.

When the agency is alleged to have included or excluded certain information from a determination, it is the Court's function, on review, in accordance with the "best information otherwise available" rule, to determine whether or not the inclusion or exclusion of such information distorts or detracts from the evidence. The distortion or detraction must render the evidence on the record insubstantial to support the agency's determination. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1562 (Fed. Cir. 1984). This test emanates from the "substantial evidence on the record" standard which

[7] *See supra* note 4.

requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

In accordance with the above language, the Court finds the information Hercules alleges was not supplied or not verified and used by Commerce has not been established as such information that would so detract from or distort the evidence as to render the evidence on the record insubstantial to support Commerce's determination. Section 1677(e) establishes the administering agency must verify all the information it relies upon for its determination. Commerce was not required to use or verify all information it received from SNPE and the GOF. It is enough for Commerce to receive and verify sufficient information to reasonably and properly make its determination.

It appears the GOF submitted incomplete information and refused to submit other requested information. The GOF relied upon Article XXI of the General Agreement on Trade and Tariffs (GATT), which authorizes the nondisclosure of information for reasons of national security.[8] This application of Article XXI to justify nondisclosure appears not to be incorporated in Section 1677 of the Trade Act. Nevertheless, the Court finds, upon review of the record, that despite Commerce's failure to obtain and verify the omitted information, it is clear there is substantial evidence on the record to support Commerce's determination. It is also clear that no distortion or detraction from the record occurred which would warrant the Court to remand the determination to Commerce.

In conclusion, the Court borrows from the language of the United States Court of Appeals for the Federal Circuit, which has aptly stated:

> [C]onsidering * * * the entire record * * * [this Court] cannot find that [there is] so little evidence on the record as to be less than a "mere scintilla" or less than that which "a reasonable mind might accept as adequate to support a conclusion." To the contrary, [this Court] find[s] that [Commerce's] determination * * * is quite reasonable and supported by substantial evidence on the record. Considering the compromise which [Commerce] must make between a perfectly accurate and an extremely rapid determination under this complex statute, [Commerce's "errors" of which Hercules complains, "if they do so exist" are] not so debilitating as to render the final determination unsupported under the substantial evidence standard.

Atlantic Sugar, Ltd., 744 F.2d at 1563.

[8] Commerce's explanation of the significance of this invocation by the GOF is set forth as follows:

> Under Article XXI of the GATT, any contracting party has the right to refuse disclosure of information where it considers such disclosure contrary to its security interests. In our view, while national security considerations cannot serve as a blanket excuse for non-cooperation, nor for non-compliance with our countervailing duty and antidumping laws, the legitimate national security interests of a respondent government must be taken into account in any decision regarding what constitutes best information available. Where access to information deemed relevant to an investigation is barred by legitimate claims of national security, resort to [sic] "best information available" supporting the most adverse assumptions or results would give every appearance of punishing the respondent for its invocation of a right recognized by the GATT and by general principles of international law and sovereignty.

Final CVD Determination, 48 Fed. Reg. at 11972, fn.1.

2. *Court No. 83–07–01075*

By a Rule 56.1 motion, plaintiff Societe Nationale des Poudres et Explosifs (SNPE), challenges the countervailing duty order, the underlying affirmative countervailing duty determination, and the ITC's injury determination. SNPE claims Commerce's determination that INC production was cross-subsidized by military nitrocellulose sales is not supported by substantial evidence on the record and is otherwise not in accordance with law. Specifically, SNPE argues Commerce's theory of cross-subsidization, adopted in response to political pressure, is both contrary to the intent of Congress and to established and sound administrative practice. SNPE contends the finding military sales were made at "premium or excess" prices was unsubstantiated by any evidence on the record. Furthermore, SNPE claims Commerce's assumption INC production was unprofitable does not establish INC operations received a benefit. SNPE also urges Commerce's methodology erroneously represented the estimated amount of any subsidy that may have existed. Defendant United States opposes these arguments contending its findings and methodology were reasonable, in accordance with law, and should be sustained.

With respect to the validity of Commerce's cross-subsidization methodology, there is no indication this methodology violates the intent of Congress or is contrary to sound administrative practice. The countervailing duty law provides for the levy and payment of duties equal to the net amount of subsidies. Countervailing duties must be determined and imposed by the administering agency in accordance with subtitle IV of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671–1677g. The administering agency has statutory authority to use the best information otherwise available when a party involved in the determination process refuses or is unable to produce requested information in the format or timely fashion required. 19 U.S.C. § 1677e(b). Nothing within the statutory framework leads the Court to conclude Commerce's application of the law is not sufficiently reasonable. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978).

Commerce investigated the possibility of cross-subsidization because Hercules contended that earnings from sales of military nitrocellulose were transferred for the purpose of asset purchases for INC production. SNPE and the GOF refused to supply Commerce with pertinent information to verify the independent profitability of INC production. Consequently, Commerce adopted the following position: "[i]n view of respondent's refusal to furnish the information required to prove or disprove the petitioner's allegation that military sales are used to provide a subsidized basis for industrial nitrocellulose, we must assume its validity." *Final CVD Determination,* 48 Fed. Reg. at 11,972.

When requested information is not disclosed upon request, § 1677e(b) directs Commerce to use the best information otherwise

available. In this case the best information otherwise available was verifiable information Hercules provided as well as other information gathered from SNPE. Commerce calculated the subsidy by utilizing a method suited for the situation and the information available. An equity based methodology was employed to provide the proper analogous representation of the cross-subsidization received by SNPE in the production of INC from the military nitrocellulose sales. It appears this methodology most accurately measured the benefit to INC operations.

Commerce's formulation of the equity methodology involved the following three elements: "(1) The respondent's company-wide rate of return on equity, (2) the rate of return achieved on industrial nitrocellulose, which was compared against the respondent's company-wide rate of return on equity, and (3) the results of these comparisons applied against purchases of fixed assets associated with industrial nitrocellulose production." *Final CVD Determination*, 48 Fed. Reg. at 11,973. The rate of return achieved from INC was assumed at a rate of zero, pursuant to the best information otherwise available rule, because SNPE was unable to cooperate in providing relevant information. Fixed asset purchases were also used because of SNPE's inability to provide pertinent data for the calculations. SNPE was unable to provide any verifiable, relevant information to assist Commerce in determining otherwise.

Commerce's cross-subsidization methodology decisions were reasonable and supported by substantial evidence on the record. In light of all the circumstances and specifically the refusal by SNPE to supply information and the facts on the record, the Court finds Commerce was justified in countervailing the subsidy provided by the earnings of military sales diverted to benefit INC production. Contrary to the argument of SNPE, that Commerce countervailed INC production upon a suspicion of a subsidy and utilized erroneous methodology calculations and assumptions, the Court finds Commerce did not make unreasonable or unsubstantiated assumptions or erroneous calculations of the subsidy to justify the Court substituting its judgment for that of Commerce. *American Spring Wire Corp.* v. *United States*, 8 CIT 20, 590 F. Supp. 1273 (1984), *aff'd sub nom., Armco, Inc.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985). The Court finds there is insubstantial evidence on the record Commerce bowed to political pressure in its determination. Commerce employed a reasonable methodology and considered all factors including asset purchases, rates of return, and INC operations. In short, Commerce's conclusions regarding cross-subsidization were based on substantial evidence in the record.

SNPE also challenges Commerce's finding a certain French law[9] conferred labor-related countervailable subsidies. SNPE contends

[9] Commerce's determination explains this law and its significance:

C. *Assumption of Labor Costs.* When SNPE was incorporated, all military and civilian personnel of its predecessor, Service des Poudres (SP), were placed at the disposal of the president of SNPE, as authorized by Article 5 of Law No.

Continued

this finding is unsupported by substantial evidence on the record and is otherwise not in accordance with law. Commerce found GOF assumptions of certain civil-status labor costs conferred countervailable subsidies upon SNPE. SNPE argues although the GOF assumed these costs for civil status employees of SNPE, the overall amount of the benefit was offset by the higher government wage level at which SNPE had to pay those civil status employees. SNPE therefore urges there was no competitive benefit to countervail under 19 U.S.C. § 1677(5). Commerce contends there is no allowance for such an offset under 19 U.S.C. § 1677(5)(B)(iv), but regardless, Commerce continues, SNPE did not raise this argument on the record of the administrative review which is before the present Court and, therefore, is barred from doing so now.

Commerce specifically argues SNPE did not make the argument the assumption of labor costs should be offset by the higher salaries of civil service workers in *any* of its comments in the administrative record. Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record at 13, *Societe Nationale des Poudres et Explosifs* v. *United States,* Court No. 83–07–01075, Joined Issue Calendar (emphasis added). SNPE agrees with Commerce that SNPE did not raise the argument in its pre-hearing, hearing, and post-hearing statements. SNPE urges these statements were addressed to the issues raised in Commerce's preliminary determination which found that there was no labor subsidy. Thus, SNPE had no reason to believe that Commerce would reach a different conclusion than it had in the preliminary determination. SNPE was not notified of Commerce's changed position until the final determination. Plaintiff's Brief in Reply to Defendant's and Intervenor's Responses in Opposition to Plaintiff's Motion for Judgment Upon the Agencies' Records at 32–33, *Societe Nationale des Poudres et Explosifs* v. *United States,* Court No. 83–07–01075, Joined Issue Calendar.

Regardless of SNPE's reasons for not making this argument during the hearing, the Court is more concerned with SNPE's allegation that the argument was raised during verification. The record contains a letter from SNPE to Commerce. Record at 2711–13. This letter responds to questions Commerce submitted to SNPE on the comparison of the cost to SNPE of "workers under status" and "private workers." SNPE argues in this letter the total cost of workers under civil status was higher than the cost of private workers and admits it does not pay "social expenses" for workers under civil sta-

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575 dated July 5, 1970. After a period of one year, those employees had the option of either: (a) Being placed again at the disposal of the Minister of National Defense; or (b) being recruited by SNPE in accordance with the provisions of the labor laws. Employees with government civil service status who remained with SNPE had the option of retaining this status. Original employees of SNPE who elected to retain civil service status would continue to be subject to the terms and conditions applicable to government employees in any facility which fell under the jurisdiction of the Minister of National Defense. According to the 1982 Report of the Government of France's Auditor General's Office, there are still a number of workers with government status employed at SNPE. All new employees hired since the establishment of SNPE have no option to choose civil service status.

Petitioner alleges SNPE is relieved of the payment of certain wage costs because a portion of its workforce retains government status. We have verified that, while SNPE is responsible for the payment of the wages for all its employees (status and non-status), it is relieved of the payment of certain benefit costs (unemployment, pension, and health insurance premiums) for those workers retaining government status.

Final CVD Determination, 48 Fed. Reg. at 11973.

tus. The letter ends as follows: "[t]he difference is therefore. * * * for people being employed in the manufacture of INC. One must remember, however, that this 'saving of social costs' is offset by higher wages. SNPE has therefore not benefitted [sic] by employing workers under status. Instead, the contrary is true." Record at 2713 (confidential information omitted).

Although the Court is not at liberty to make *de novo* determinations, but only review the determinations on the basis of the administrative record pursuant to 19 U.S.C. § 1516a, the above language of the letter in the record clearly stands in contradiction to Commerce's argument SNPE never raised the argument in the administrative proceedings. Accordingly, the Court will entertain this claim.

Section 771(5)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5)(B)(iv) establishes a countervailable subsidy includes the assumption of production costs. Section 1677(5)(B)(iv) provides in pertinent part as follows:

> (5) **Subsidy.**—The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes, but is not limited to, the following:
>
> * * * * * * *
>
> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> * * * * * * *
>
> (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

19 U.S.C.A. § 1677(5)(B)(iv) (1982).

Offset allowances in the calculation of a net subsidy are comprised within § 1677(6), which provides as follows:

> (6) **Net Subsidy.**—For the purpose of determining the net subsidy, the administering authority may subtract from the gross subsidy the amount of—
>
> (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
>
> (B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
>
> (C) Export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

19 U.S.C.A. 1677(6)(9182).

It is clear SNPE was relieved of the costs of certain wage benefits (pension, unemployment, and health insurance premiums) consti-

tuting expenses of the production of INC. These benefits constitute subsidies as set forth in § 1677(5)(B)(iv). It is also apparent the offset of higher wages, which SNPE claims should be applied in the net subsidy calculation, does not fit into any enumerated exception set forth at § 1677(6). No application fee, deposit, or similar payment was made which would warrant an offset in the computation of the net subsidy. SNPE pays its employees on a determined pay scale and the GOF pays the work related benefits to those employees retaining civil status. SNPE does not exist as a conduit of benefits transferred from the GOF to SNPE's workers, thereby justifying an offset. Commerce's determination that labor-related subsidies were countervailable is therefore sustained.

SNPE's third dispute with Commerce's determination concerns the treatment of certain grants received by SNPE from the GOF to modernize the pyrotechnical safety works of SNPE's plant at Bergerac. SNPE contends Commerce's determination that these funds were a countervailable subsidy was unsupported by substantial evidence on the record and is otherwise not in accordance with law. SNPE claims this GOF grant by the Ministry of Defense was bestowed at the time of SNPE's incorporation and was partial consideration for the GOF's transfer of assets for equity. This is evident, argues SNPE, in the valuation performed by the auditors on assets completed during SP's restructuring. Valuation was based on the assumption that modernization of the pyrotechnical safety works would occur.

Commerce contends the record clearly shows the money given by the GOF to SNPE for the purchase of pyrotechnical equipment was a monetary grant given to a single corporation with no expectation of return on equity. This monetary grant was unlike the separate "equity for assets" swap the GOF made with SNPE in the restructuring of SP. Commerce argues that although the creation of SNPE and the decision to bestow the grant on SNPE occurred at the same time, this fact, in and of itself, does not establish the grant was reimbursement for the original restructuring agreement and asset transfer between the GOF and SNPE. Commerce asserts the grant was taxed by the GOF as income to SNPE.

Substantial for SNPE's argument includes a reference to Commerce's verification report of March 11, 1983. This report alludes to the valuation process undertaken by the auditors in France and includes the following:

> We questioned Mr. Benichou about the program to upgrade security installations at the SNPE facilities. When the government decided to create SNPE, the Economics Ministry, in conjunction with accounting and engineering experts, valuated all assets which were to be exchanged for equity. The auditors certified that the value of the assets had appreciated and made it known that they had reservations about the security installations at the facilities. They let it be known that the company

> would face great liabilities in case of an accident and therefore, would not certify the valuations without the government's committment to undertake the necessary improvements. The government accepted those recommendations and agreed to undertake the improvements at the time of SNPE's incorporation.

Plaintiff's Brief in Reply to Defendant's and Intervenor's Responses in Opposition to Plaintiff's Motion for Judgment Upon the Agencies' Records, *supra*, at 39 (quoting the record at 2909) (emphasis deleted).

It is clear from the record the grant for modernization was not tied in to the original bargained for agreement and transfer of assets for equity but existed as an independent countervailable subsidy. 19 U.S.C. § 1677(5)(B)(i). It appears the auditors did not value the assets to include the yet-to-be obtained modernization grants. They merely refused to certify their valuation until there were assurances that improved security measures were taken to prevent substantial loss from accidents. There is further support for this position as evidenced by the GOF's treatment of this grant as income for the purposes of taxation. Although Commerce determined the underlying restructuring and asset transfer involved with the creation of SNPE was not a subsidy, it does not necessarily follow that all other ancillary activities surrounding that event are not countervailable. Each program and alleged subsidized activity must be examined on an independent basis. Commerce's determination is sustained.

SNPE's last complaint concerns Commerce's determination certain GOF tax and non-tax regional incentive programs constituted countervailable domestic subsidies. As applicable to this case, SNPE contends the language in 19 U.S.C. § 1677(5)(B), which defines a subsidy as that which is provided to a "group of enterprises or industries" is ambiguous and does not include regional preferences. According to SNPE, such an interpretation would conflict with the GATT, which gave rise to the current countervailing duty law. SNPE alludes to Article 11 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXII of the GATT. This section deals with subsidies and countervailing duty measures. It provides, in pertinent part, as follows:

Article 11.—*Subsidies other than export subsidies.*

> 1. Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives, which they consider desirable. Signatories note that among such objectives are:
>
> > a) The elimination of industrial, economic and social disadvantages of specific regions * * *.

Agreement on Interpretation and Application of Articles VI, XVI, and XXII of the General Agreement on Tariffs and Trade, April 12, 1979, part I, article 11, 31 UST 532, TIAS No. 9619.

SNPE asserts that because the definition of subsidy in the statute is unclear with respect to regional programs, there is no authority for countervailing such programs. Therefore, continues SNPE, Article 11 of the GATT controls and prohibits the countervailing of regional GOF tax and non-tax incentive programs.

Commerce challenges the procedural merit of SNPE's GATT argument as not having been raised at the administrative level. Commerce argues "although SNPE did on several occasions during the administrative proceedings contend that the amount of the subsidies received * * * should be calculated differently * * * SNPE never argued that the countervailing of domestic subsidies was prohibited by GATT." Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, *supra*, at 19. SNPE argues its reference to GATT is presented only as an aid in construing 19 U.S.C. § 1677(5)(B).

A litigant must exhaust administrative remedies before it may raise a claim in a civil action. However, where a new claim is asserted outside of the administrative record by a party who participated in the administrative proceeding, and the claim is purely legal and does not add factual data to the record, it is within the Court's discretion to consider the claim. The Court must bear in mind any prejudice to the parties which would result from the failure to raise the issue in the proceedings below. *Rhone Poulenc, S.A.* v. *United States*, 7 CIT 133, 136, 583 F. Supp. 607, 611 (1984).

SNPE's GATT argument arises out of its challenge to Commerce's interpretation of "subsidy" under § 1677(5)(B). This is the controlling legal claim at issue, a claim which SNPE clearly raised in its challenge below. Observing no prejudice to the defendant, the Court finds it is within its discretion to entertain SNPE's argument.

Commerce also opposes the substantive merit of SNPE's contentions and urges 19 U.S.C. § 1677(5)(B) clearly provides domestic subsidies are countervailable if provided by government action to a specific enterprise or industry, or group of enterprises or industries. According to Commerce, this definition would include the regional preferential program at issue. Commerce supports its argument with references to a number of countervailing duty determinations and case law. SNPE, although distinguishing some of the cases, has provided no support for its proposition.

It is clear from the case law, the term "subsidy" has been interpreted to include regional preference programs as countervailable subsidies. *See United States Steel Corp.* v. *United States*, 5 CIT 245, 254, 566 F. Supp. 1529, 1537 (1983); *see also ASG Industries, Inc.* v. *United States*, 67 CCPA 11, C.A.D. 1237, 610 F. 2d 770 (1979); *Carlisle Tire and Rubber Co.* v. *United States*, 5 CIT 229, 233, 564 F. Supp. 834, 838 (1983); *ASG Industries, Inc.* v. *United States*, 85 Cust.

Ct. 10, C.D. 4863, 495 F. Supp. 904 (1980); *ASG Industries, Inc.* v. *United States*, 82 Cust. Ct. 101, C.D. 4794, 467 F. Supp 1200 (1979).

Section 1677(5)(B) sets forth examples of government practices identified as domestic subsidies. It is clear Congress painted this definitional section with a broad stroke with it provided in the opening paragraph of (5) that the examples listed under the meaning of "subsidy" were not exhaustive. Section 1677(5)(B) provides in pertinent part:

> (5) **Subsidy.**—The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and *includes, but is not limited to,* the following:
> * * * * * * *
>
> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, *or group of enterprises or industries,* whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise * * *.

19 U.S.C.A. § 1677(5)(B) (1982) (emphasis added).

The statute, case law, and prior countervailing duty determinations by Commerce clearly support the reasonableness and lawfulness of Commerce's determination that the regional incentive programs are countervailable subsidies. Commerce's final countervailing duty determination explained the rationale as follows:

> D. *Regional Development Incentives.* The government of France provides a series of tax and non-tax regional incentives to French and foreign businesses to establish new, or to expand existing businesses in certain French regions selected as those in which to promote additional development. The Delegation a l'Amenagement du Territoire et l'Action Regionale (DATAR) coordinates the programs of various government agencies and ministries. The Department has verified that, for incentive purposes, France is divided into several zones. Each zone, or part of a zone, is eligible for different types and levels of assistance. The assistance includes development grants, non-industrial grants, research and development grants, decentralization indemnities, and job training subsidies. Since the availability, kind and extent of benefits received under these programs are based upon regional preferences, we determine assistance provided through DATAR constitutes subsidies within the meaning of the Act.
>
> SNPE reported the receipt of a grant in 1979, designated for the Bergerac plant, for the purpose of improving production facilities and general infrastructure. Using the Department's usual methodology for grants, we calculated an *ad valorem* benefit of 0.052 percent.

Final CVD Determination, 48 Fed. Reg. at 11,973.

The DATAR grants were specifically designated for "enterprises or industries" grouped according to regions in France. Section

1677(5)(B) provides the term "subsidy" includes those subsidies provided by a government to a group of enterprises or industries. The case law set forth above clearly includes regional preference programs as countervailable subsidies. Therefore, in light of the case law and § 1677(5)(B), Commerce's determination that the DATAR regional incentive programs were countervailable subsidies was reasonable. Furthermore, Article 11 of the GATT does not control the resolution of this issue. The Court need not utilize GATT for interpretative purposes. The countervailing duty law authorizes Commerce to countervail subsidies as set forth in § 1677(5)(B). *See British Steel Corp.* v. *United States*, 9 CIT 85, 605 F. Supp. 286 (1985). Commerce's determination was substantiated by the record and was otherwise in accordance with law.

SNPE, in this action, also challenges the ITC's injury determination as set forth in *Nitrocellulose From France*, 48 Fed. Reg. 27,453 (1983). Specifically, SNPE, in its motion for judgment upon the agency record claims the finding by the majority of the Commissioners that Hercules was materially injured by reason of French imports of INC, prior to 1982, is unsupported by substantial evidence on the record and is otherwise not in accordance with law.

The ITC defends its position alleging it made its affirmative determination after evaluating all relevant economic factors bearing on the state of the industry. According to the ITC, it reasonably concluded a domestic INC industry was materially injured. The ITC also defends its determination that subsidized imports of INC from France were the cause of the above-determined material injury. The ITC claims its affirmative determination was in accordance with law since it was based on the criteria to be considered under section 771(B)–(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(B)–(C) and the best information available.

In final countervailing duty investigations, the ITC is charged with the responsibility of determining whether:

> (A) an industry in the United States—
>
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of any industry in the United States is materially retarded,
>
> by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section [dealing with final determinations by Commerce].

19 U.S.C.A. § 1673d(b)(1) (1982). If the ITC finds there is present injury (or threat to or retardation of the establishment of an industry) and finds this material injury is by reason of the imports under investigation, then the ITC must make an affirmative finding in the

investigation. "Material injury" is "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C.A. § 1677(7)(A) (1982).

Congress has provided the ITC with a set of guidelines to employ in its consideration and determination of material injury involving countervailable subsidies. The guidelines are set forth in a manner which allows the ITC flexibility in its deliberations; the guidelines are illustrative but not exhaustive. *American Spring Wire Corp.* v. *United States,* 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984), *aff' sub nom. Armco, Inc.* v. *United States,* 760 F.2d 249 (Fed. Cir. 1985). These guidelines are set forth, in pertinent part, as follows:

> **(B) Volume and consequent impact.**—In making its determinations * * * the Commission shall consider, among other factors—
>
> (i) the volume of imports of the merchandise which is the subject of the investigation,
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
> (iii) the impact of imports of such merchandise on domestic producers of like products.
>
> **(C) Evaluation of volume and of price effects.**—For purposes of subparagraph (B)—
>
> **(i) Volume.**—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to product or consumption in the United States, is significant.
> **(ii) Price.**—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> **(iii) Impact on affected industry.**—In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices, and
> (III) actual potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.
>
> * * * * * * *

> **(E) Special rules.**—For purposes of this paragraph—
> * * * * * * *
>
> **(ii) Standard for determination.**—The presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury.

19 U.S.C.A. § 1677(7)(B)–(C), (E) (1982). The ITC has discretionary authority to weigh and assign significance to any of these factors. *American Spring Wire,* 8 CIT at 23, 590 F. Supp at 1277. When the Court reviews the injury determination of the ITC, it "may not weigh the evidence concerning specific factual findings, nor may the Court substitute its judgment for that of the Commission." *Id.* at 22, 590 F. Supp. at 1276 (quoting *Sprague Electric Co.* v. *United States,* 2 CIT 302, 310–11, 529 F. Supp. 676, 682–83 (1981) (footnote omitted).

SNPE claims the ITC's determination Hercules was materially injured was erroneous. SNPE argues the record does not support an affirmative injury determination for the years 1979–1981. Prior to 1982, SNPE continues, Hercules' profitability was strong, with slight declines in 1980 and 1981. These levels of decline were not sufficient enough to constitute material injury. Citing *American Spring Wire,* SNPE urges a lack of profitability, *per se,* does not constitute material injury. Lack of profitability must be sufficient to outweigh the other factors under consideration to sustain the ITC's determination. SNPE also points to specific statistics in the record to show insufficient support for the ITC's determination.

The ITC, on the other hand, contends plaintiff's views if supported by the evidence constitute an optional view of the facts. This optional view does not constitute a basis for establishing the determination was erroneous. The ITC points to specific factors in the record that substantiate its determination was in accordance with the statutory factors to be considered. According to the ITC, the record reveals Hercules' total INC production as well as its capacity utilization rate declined between 1979 and 1982. Although Hercules expanded its production capacity during this timeframe, the ITC determined the capacity expansion was reasonably made in a market where the demand for INC did not shrink significantly. Hercules' expansion was based on customer demand and reasonable business estimates of the market and capacity utilization. According to the ITC, the record reasonably reveals the increases in capacity did not substantially account for the harm experienced by Hercules. Domestic shipments and profit trends declined from 1979 to 1982, with slight increases in 1980 and 1981. The ITC contends employment figures also support the ITC's determination. In short, in the ITC's view, the record shows a domestic industry was materially injured.

SNPE also claims the ITC should not have chosen the 1979–1982 period as the relevant timeframe for the countervailing duty inves-

tigation. In SNPE's view, the ITC should have investigated only through 1981. The Court holds, however, this choice is within the discretion of the administering agency. *See American Spring Wire,* 8 CIT at 26, 590 F. Supp. at 1279; *British Steel Corp.* v. *United States,* 8 CIT 86, 593 F. Supp. 405 (1984).

Although the record does not indicate Hercules experienced a dramatic and critical economic injury, such a level of injury need not be established to support the ITC's determination. Section 1677(7)(A) provides that the harm must reach a level above inconsequential, immaterial, or unimportant. In addition, when the Court is confronted with two opposing, but substantiated views of the record, it is not the ambit of the Court to choose the view which it would have chosen in a trial *de novo.* Rather, the Court must sustain the administering agency's view if it is supported by substantial evidence on the record and in accordance with law. *See American Spring Wire,* 8 CIT 20, 590 F. Supp. 1273. The ITC did not rely solely on a probability factor to determine material injury was sustained by a domestic industry. As discussed above, the ITC considered other factors and made a determination substantiated by the record and otherwise in accordance with law.

SNPE alleges the ITC was incorrect in finding Hercules was materially injured by reason of French imports of INC. Although SNPE admits the legislative history of the countervailing duty law[10] "suggests" the effects of subsidized imports need not be weighed against effects of alternative causes of material injury, SNPE urges the ITC did not verify that the subsidized imports by SNPE were the cause of material injury. Specifically, SNPE charges the imports from France had no more than a *de minimus* effect on the domestic industry; and in fact, the injury sustained by Hercules was caused by excess capacity, a decline in the market demand for INC, and excessive increases in internal production costs.

The ITC defends its position by referring to the statute[11] which requires material injury be "by reason of" subsidized imports. The ITC contends it is only required to determine if the subsidized imports were a cause of the material injury; the ITC need not weigh the effects of all possible factors of injury. *Id.* The ITC claims its determination should be sustained because the record substantiates its findings which were derived from careful adherence to the statutory criteria as set forth at 19 U.S.C. § 1677(7).

Section 1677(7) directs the ITC to consider, among other factors, the volume of imports, the effect of these imports on domestic prices, and the impact of the imports on domestic producers of like products. 19 U.S.C. § 1677(7)(B). In making determinations under § 1677(7)(B), the ITC is further guided by § 1677(7)(C) which sets forth the criteria to apply in analyzing volume, price, and impact on the affected industry. In accordance with these statutory criteria,

[10] S. Rep. No. 249, 96 Cong., 1st Sess. 57 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979).
[11] 19 U.S.C. § 1671d.

the Court holds the ITC's determination is in accordance with law and substantiated by the evidence on the record.

Section 1677(7)(C)(i) establishes the ITC "shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C.A. § 1677(7)(C)(i) (1982). In the instant case, the ITC collected and analyzed data on the absolute volume of imports of INC from France and evaluated this volume in relation to its captive share of the U.S. market. The ITC observed imports increased in volume and captured a share of the declining U.S. market during 1979–1982. It was established domestic sales declined as French imports increased in a relatively stable market during the period covered by the investigation. Commerce made a determination substantiated by the record that increasing French imports were displacing Hercules' sales in the U.S. market. These findings established a significance in relation to the volume or increased volume of imports under § 1677(7)(C)(i)

Price is also a factor to be considered by the ITC in its material injury determination. The ITC is directed to consider whether or not there has been significant price undercutting by the foreign goods as compared with the price of like products in the domestic market. The ITC must also consider whether or not the effect of imports significantly depresses prices or prevents price increases. 19 U.S.C. § 1677(7)(C)(ii).

In the instant investigation, the ITC determined price undercutting and price suppression resulted from the imported INC from France. The ITC issued the following statement of reasons for the material injury finding with regard to prices:

> Weighted average prices of nitrocellulose were compared on f.o.b. U.S. point of shipment and delivered bases. While domestic prices increased irregularly during the period from 1980 through 1982, prices of French imports increased at a slower rate for the same period. As noted previously, the cost of goods sold for the domestic producers increased dramatically from 1980 through March 1983; however, domestic prices failed to keep pace with these increases and resulted in losses for the domestic industry.
>
> Purchasing decisions are especially price sensitive on fungible commodities such as the commercially-interchangeable domestic and imported nitrocellulose that is the subject of this investigation. In a survey of firms reporting some purchase of French nitrocellulose, price was mentioned as one of the most important factors in their purchasing decisions. Moreover, in investigating allegations of lost sales, interviews with purchasers confirmed the importance of price in purchasing decisions. Based on the fungible nature of nitrocellulose, together with the demonstrated importance of price in purchasing decisions,

> the small margins of underselling reported in this investigation are particularly significant.

Nitrocellulose From France, Investigation No. 701–TA–190 (Final), USITC Publication 1390, at 7–8 (June 1983) (footnotes omitted).

In support of its determination, the ITC makes substantial reference to the record. The record shows significant changes in underselling in the foreign producer's pricing practices effecting the domestic prices. Underselling occurred in six out of seven quarters during the preliminary investigation and in seven out of thirteen quarters during the final investigation. The ITC determined there were substantial increases in purchases of INC from France by Hercules' customers. The ITC observed these increases forced Hercules to lower its price to meet the French competition, thus resulting in price suppression.

In accordance with the statutory criteria, the ITC is also directed to examine the impact of the imports on the domestic industry. The ITC must evaluate all relevant economic factors having a bearing on the industry which include the following:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices, and
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

19 U.S.C.A. § 1677(7)(C)(III) (1982). With regard to impact on the industry, the ITC in its final determination commented as follows:

> Lost sales information developed during the course of this investigation confirmed allegations of sales lost to French imports because of lower prices. Information provided by nitrocellulose customers accounting for over 95 percent of alleged lost sales shows a substantial increase of these customers' purchases of French imports both in absolute terms and as a share of their total nitrocellulose purchases for the period 1980 through 1982. Eleven of the sixteen purchasers contacted indicated that they switched because of the lower price of the French product or more favorable credit terms. Five of these eleven firms switched from Hercules to the French importer as their primary source of supply for nitrocellulose during 1982 when imports were increasing as a share of apparent consumption.

Nitrocellulose From France, Investigation No. 701–TA–190 (Final) at 8 (footnotes omitted).

The ITC investigated lost sales data and found French INC was purchased instead of U.S. INC for price related reasons. A significant number of Hercules' lost customers responded price was a significant reason for abandoning Hercules for the French import. The increase in the purchases of French imports by Hercules' customers adversely affected the domestic industry through a loss of sales and

decreased prices. It has been observed: "[s]ales lost due to underpricing is an important test of injury in the case of fungible goods [such as INC]." *Gifford-Hill Cement Co.* v. *United States*, 9 CIT 357, 368, 615 F. Supp. 577, 586 (1985).

Having reviewed the ITC's determination and the facts supporting the determination, the Court concludes the ITC findings are substantiated by the record and are otherwise in accordance with law. SNPE argues Hercules' expansion efforts, its excessive internal costs, and the decline in the domestic market for INC should be considered as the substantial cause of Hercules' material injury. SNPE's alternative view of the record, however, does not supply a sufficient basis for reversing the determination of the ITC. If the ITC finds material injury exists due to an even slight contribution from imports, the ITC may not weigh this contribution against the effects of other factors that are not used in the determination. *Id.* It has been held that the ITC "is charged only with rationally considering impact on the domestic industry in light of the relevant factors * * * '[and] is not required to issue findings and conclusions on an issue concerning a statutory element simply because it was presented by the petitioner.' " *Id.* at 369–70, 615 F. Supp. at 587 (in part, quoting *Jeanette Sheet Glass* v. *United States*, 9 CIT 154, 161–62, 607 F. Supp. 123, 130 (1985). If there is substantial evidence to support the ITC's determination, it is not the province of the Court to substitute its own conclusion of the facts for that of the administering agency.

SNPE concludes its argument by charging the ITC failed to conduct a thorough investigation by: (1) not investigating Hercules' cost increases before determining French imports prevented Hercules from raising prices to cover costs; (2) not obtaining an actual breakdown in each year of the basic cost components; (3) not measuring the reasonableness of cost increases; and (4) not recognizing cost increases caused by internal influences were responsible for Hercules' declining domestic profits. Nothing in the record supports the "lack of thoroughness" allegations of SNPE to remand this determination to the ITC. There appears to be no recognized or statutorily set minimum standard by which the thoroughness of the investigation is measured. *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1561 (Fed. Cir. 1984). Furthermore, it bears repeating that "[i]t is within the [ITC's] discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council* v. *United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). If there is an inadequate collection of data or a misinterpretation of data which renders the ITC's determination unsubstantiated by the record, or otherwise not in accordance with law, then the reviewing court must either reverse the determination or remand the case. *See Atlantic Sugar*, 744 F.2d at 1562. This situation, however, does not exist in the instant action.

Concerning SNPE's allegation the ITC failed to investigate Hercules' cost increases and to recognize the implications of these increases, this Court has previously discussed the ITC's determination that material injury was by reason of the subsidized imports. The ITC collected and verified information demonstrating the harm was not due to cost increases but rather was due to the subsidized imported merchandise. Data from the questionnaires was sufficient to ascertain Hercules' costs. Nothing in the record reflects a finding that the cost increases were inadequately investigated. That SNPE believes the ITC should draw a different conclusion from the record is not sufficient grounds to reverse or remand the ITC's determination.

SNPE also states the ITC should not have accepted Hercules' cost allocations in lieu of an actual breakdown of costs. According to SNPE, this was the means by which Hercules concealed its reasons for actual cost increases. The ITC defends its investigation arguing that the omission of a detailed breakdown of the cost of goods does not render the record incomplete. It is within the discretion of the ITC to sift through the evidence and make a determination that is reasonable and supported by substantial evidence. The form in which information is received which in this case consisted of fixed percentages rather than an actual breakdown, does not, in and of itself, provide the Court with a basis for finding the ITC's investigative process inadequate.

The ITC requested from Hercules an actual breakdown of individual component costs. Hercules informed the ITC such data was not readily available and stated that the fixed percentages attributable to the individual component costs submitted by it were the only figures available. The ITC verified the fixed percentages as actual data for 1982 and allocated these rates to the total cost of goods sold for the earlier periods. The Court therefore holds the ITC's investigation was adequately conducted with the best information available and did not result in an unreasonable or unsubstantiated determination.

Concerning SNPE's last two challenges of the ITC's analysis of the cost increases, the Court reiterates that the ITC investigation was adequate and diligently undertaken. The ITC's investigation was reasonable, and the resultant determination was substantiated by evidence on the record. The fact that SNPE believes the ITC should have reached different conclusions from its analysis does not provide a sufficient basis for holding the determination was unreasonable. As stated before, "[i]t is within the [ITC's] discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council*, 9 CIT at 300, 613 F. Supp. at 1244. The Court recognizes the following;

> That [SNPE] can point to evidence [on the] record which detracts from the evidence which supports the [ITC's] decision

> and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the [ITC], it would have made the same decision on the basis of the evidence. Our role is limited to deciding whether the [ITC's] decision is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." In this case, no basis has been shown for holding the [ITC's] determination unlawful under that limited standard of review.

Matsushita Electric Industrial Co., Ltd. v. *United States*, 750 F.2d 927, 936 (Fed. Cir. 1984) (footnote omitted). Accordingly, the Court affirms the determination of the ITC and dismisses this action.

III. The Antidumping Investigation

A. *Introduction*

On July 2, 1982, Hercules filed an antidumping petition with Commerce and the ITC alleging industrial nitrocellulose (INC) from France was being sold in the United States at less than fair value and that such sales materially injured or were threatening to materially injure a United States industry. Hercules also alleged sales in the home market were taking place at prices below the cost of production.

After reviewing the petition, Commerce determined there was sufficient information warranting the initiation of an antidumping investigation. On July 14, 1982, Commerce notified the ITC and published notice of its initiation of a preliminary antidumping duty investigation on July 28, 1982. *Initiation of Antidumping Investigation; Industrial Nitrocellulose From France*, 47 Fed. Reg. 32,557 (1982). On August 25, 1982, the ITC published an affirmative preliminary injury determination, finding there was a reasonable indication a United States industry was being, or was threatened with material injury by imports of INC from France. *Nitrocellulose From France*, 47 Fed. Reg. 37,314 (1982).

On November 26, 1982, upon receiving a request from Hercules, the ITC published notice of a postponement of the issuance of a preliminary determination with respect to sales at less than fair value, declaring the investigation extraordinarily complicated. *Industrial Nitrocellulose From France; Postponement of Preliminary Antidumping Determination*, 47 Fed. Reg. 53,441 (1982). The period for making the preliminary determination was extended by 14 days until December 23, 1982 at which time Commerce published a preliminary determination that INC from France was not being sold or was not likely to be sold at less than fair value in the United States. Commerce found the weighted-average margin was 0.43137%, which was determined to be *de minimis*. *Preliminary Determination of Sales At Not Less Than Fair Value; Industrial Nitrocellulose From France*, 47 Fed. Reg. 57,308 (1982).

Commerce provided opportunity for interested parties to comment accordingly. At the request of the petitioner Hercules, Commerce published a notice, on March 1, 1983, extending the period for making a final determination until May 9, 1983. *Industrial Nitrocellulose From France; Antidumping Investigation; Extension of Period for Final Determination*, 48 Fed. Reg. 8,523 (1983).

Commerce published an affirmative final determination on May 13, 1983, pursuant to section 735(a) of the Tariff Act of 1930, as amended, 19 U.S.C. 1673d(a), that INC from France was being sold in the United States at less than fair value at a weighted-average margin of 1.38%. *Final Determination of Sales at Less Than Fair Value; Industrial Nitrocellulose From France*, 48 Fed. Reg. 21,615 (1983). Commerce then suspended liquidation of all entries of INC from France and notified the ITC of Commerce's determination. On July 23, 1983, the ITC determined the subject imports were materially injuring a United States industry and notified Commerce of this determination. The ITC then published, on August 3, 1983, its affirmative final determination, pursuant to section 735(b)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. 1673d(b)(1), that imports of INC from France were materially injuring a United States industry. *Nitrocellulose From France*, 48 Fed. Reg. 35,186 (1983). In accordance with section 736 of the Tariff Act of 1930, as amended, 19 U.S.C. 1673e and with 19 C.F.R. 353.48, Commerce published an antidumping order on August 10, 1983. *Industrial Nitrocellulose From France; Antidumping Duty Order*, 48 Fed. Reg. 36,303 (1983).

Hercules initiated an action, on September 8, 1983, seeking judicial review and reversal of certain findings in Commerce's final antidumping determination, Court No. 83–09–01324 (LTFV 1324). SNPE followed by filing an action, Court No. 83–09–01325 (LTFV 1325), on October 17, 1982, seeking judicial review and reversal of certain factual findings of Commerce and the ITC resulting in the antidumping order at 48 Fed. Reg. 36,303.

B. *Contentions of the Parties in Court No. 83–09–01325.*

In this case, SNPE moves for judgment upon the agency records of Commerce and the ITC in *Final LTFV Determination*. In its challenge of Commerce's determination, SNPE contends the following:

> (1) Commerce failed to grant SNPE an adjustment for differences in levels of trade and such decision is neither supported by substantial evidence on the record, nor is otherwise in accordance with law;
> (2) Commerce erred in assigning to INC production the research and development expenses which are tied to other products or product lines exclusively. Such a determination is unsupported by substantial evidence on the record and is otherwise not in accordance with law; and
> (3) Commerce's decision to use an accelerated depreciation method instead of a straight-line method is unsupported by the record and unlawful.

The United States defends its determinations arguing the following actions were substantiated by evidence on the record and were otherwise in accordance with law: (1) Commerce's decision not to grant an adjustment for purported differences in the levels of trade at which SNPE sold INC in France and the United States; (2) Commerce's allocation of research and development costs in computing SNPE's cost of production; and (3) Commerce's use of accelerated depreciation in calculating depreciation costs for SNPE's cost of production. Defendant-intervenor SNPE generally concurs with the contentions of the defendant United States.

SNPE also challenges the findings of the ITC's injury determination on substantially the same grounds as it challenged the ITC's injury determination in Court No. 83–07–01075. The Court has already addressed and dismissed the challenges to Court No. 83–07–01075.[12]

C. *Contentions of the Parties in Court No. 83–09–01324.*

Plaintiff in this case, Hercules, moved for judgment upon the administrative record of Commerce in *Final LTFV Determination.* Hercules' contentions are set forth as follows:

> (1) Commerce did not use the "best information available" and erroneously allowed SNPE's finance cost component of costs of production for adjustment purposes to be allocated to the foreign market value resulting in a failure to arrive at a proper determination of whether or not SNPE's cost of production for INC exceeds its home market price. Hercules contends these actions by Commerce are not substantiated by evidence on the record and are not otherwise in accordance with law;
> (2) Neither the record nor the law supports Commerce's failure to reject SNPE's alleged allocation of its selling expenses across sales to related customers; and
> (3) Commerce's erroneous understatement of SNPE's allocated costs and selling expenses resulted in a lower calculation of the costs of production and ultimately an incorrect calculation of the margin of less than fair value sales.

The defendant United States opposes these allegations and states:

> (1) It was reasonable and in accordance with law for Commerce to use SNPE's verified financial statements as the basis for determining cost of production because this information was maintained in accordance with generally accepted accounting principles; and
> (2) Commerce properly exercised its discretion and acted reasonably in allocating selling expenses evenly over sales to related and unrelated parties.

Defendant-intervenor SNPE generally concurs with the government's position.

[12] The conclusions of the majority of commissioners regarding the appropriate product and domestic industry were the same in the preliminary and final antidumping and countervailing duty investigations and were adopted in both published views. *See Nitrocellulose From France,* Investigation No. 701–TA–190 (Final), USTIC Publication 1390, at 3 (June 1983); *Nitrocellulose From France,* Investigation No. 731–TA–96 (Final) USTIC Publication 1409, at 3–4 (June 1983).

D. *Discussion*

1. *Introduction*

The antidumping law is intended to protect domestic industries from the ill effects of foreign merchandise that is sold or is likely to be sold in the United States at less than fair value. 19 U.S.C. §§ 1673 *et seq.* Section 1673 provides:

§ 1673 Imposition of antidumping duties

If—

> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

19 U.S.C.A. § 1673 (1982).

Commerce has been given broad discretion to administer the antidumping law. Nevertheless, it has been noted that, "while the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these must be followed. *Smith Corona Group* v. *United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

Upon review of the present action, the Court must sustain Commerce's antidumping duty determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.A. § 1516a(b)(1)(B) (1982). This "substantial evidence test" restricts the scope of the Court's review of the agency record. As previously stated, much deference is given to the agency's interpretation. As long as the interpretation is sufficiently reasonable, it will be sustained. Furthermore, it need not be the only reasonable interpretation. *Atcor, Inc.* v. *United States,* —— CIT ——, ——, 658 F. Supp. 295, 299 (1987). In arriving at a clear understanding of the meaning of "substantial evidence," it has been recognized:

> 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Substantial evidence 'is

> something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'

Matsushita Electric Industrial Co. v. *United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938); and quoting *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 619 (1966) respectively).

2. *Court No. 83–09–01325*

In challenging Commerce's *Final LTFV Determination*, plaintiff SNPE claims Commerce erroneously refused to allow an adjustment for alleged differences in levels of trade between the United States and France. SNPE contends a level of trade adjustment is warranted in this situation because sales by SNPE in the United States and France are conducted at different levels of trade including discounted sales to a U.S. distributor, non-discounted sales to French end-users, and discounted sales to French bulk purchasers. SNPE contends the GATT and 19 C.F.R. § 353.19 require adjustments be made for level of trade differences. SNPE criticizes Commerce's interpretation and implementation of the controlling regulation on this issue, 19 C.F.R. § 353.19. SNPE suggests the home market price to French end users should be adjusted by the amount of the discount given on sales to the U.S. distributor, which SNPE believes is the appropriate level of trade adjustment.

Commerce opposes this view and affirmatively defends its decision not to grant the level of trade adjustment as a reasonable employment of Commerce's authority to administer its regulations. Commerce maintains SNPE did not provide any verifiable, credible evidence, or otherwise substantiate its claims to warrant a different conclusion. Defendent-intervenor Hercules agrees with this position.

The regulation at issue, 19 C.F.R. § 353.19, deals with the authority of Commerce to grant level of trade adjustments in the imposition of antidumping duties. The regulation is set forth as follows:

> **§ 353.19 Level of trade.**
>
> The comparison of the United States price with the applicable price in the market of the country of exportation (or, as the case may be, the price to or in third country markets) generally will be made at the same commercial level of trade. However, if it is found that the sales of the merchandise to the United States or in the applicable foreign market at the same commercial level of trade are insufficient in number to permit an adequate comparison, the comparison will be made at the nearest comparable commercial level of trade and appropriate adjustments will be made for differences affecting price comparability.

19 C.F.R. § 353.19 (1982).

SNPE, in the investigation below, requested adjustment be made to reflect the different levels of trade involved. Commerce refused this request and responded as follows:

> To date, SNPE has not produced information which establishes that a price differential exists in the home market for industrial nitrocellulose or other merchandise of the same class or kind sold at different levels of trade. Such information, if provided, must establish that the differences in the prices are the result of differences in cost of selling at one level of trade as compared to the other. Since no evidence has been received by the DOC which would satisfy the standards of § 353.19 of the Commerce Regulations in this regard, we have not made a level of trade adjustment in making our final determination.

Final LTFV Determination, 48 Fed. Reg. at 21,617.

SNPE interprets Commerce's response as requiring a "two-prong test" and urges this test led Commerce to arrive at an erroneous determination. SNPE claims this "two-prong test" comprises the following: (1) "no adjustment for different levels of trade will be made unless different levels of trade exist in the home market * * * [; and 2)] level of trade adjustment[s must] be measured by the differences in selling costs incurred at different levels of trade [rather than allowing merely] 'appropriate adjustments.' " Plaintiff's Brief in Support of Motion for Judgment Upon the Agencies' Records at 15–16, *Societe Nationale des Poudres et Explosifs* v. *United States*, Court No. 83–09–01325, Joined Issue Calendar.

As Commerce asserts, it appears SNPE has misinterpreted Commerce's rationale for disallowing an adjustment. Before considering the agency's alleged "test," it is necessary to consider the opening words of Commerce's statement: "To date, SNPE has not produced information which establishes that a price differential exists * * * at different levels of trade." 48 Fed. Reg. at 21,617. The regulation is also clear at "appropriate adjustments will be made for differences affecting price comparability." 19 C.F.R. § 353.19.

In determining whether or not to grant a level of trade adjustment, Commerce must look to "differences affecting price comparability." Where SNPE does not provide Commerce with any substantiating evidence of differences "affecting price comparability," including cost differences, Commerce has an inadequate basis for which to grant a level of trade adjustment. SNPE contends the following establish a level of trade differential that requires an adjustment: (1) different levels of trade exist in the foreign and domestic sales of INC; (2) discounts were offered to the U.S. distributor; and (3) while end-users were the only purchasers in France, there was a distributor-purchaser of INC in the U.S. SNPE requests adjustment based on a difference in selling costs but does not provide Commerce with substantial evidence concerning the "affected price comparability."

Commerce cannot adjust prices for level of trade differences in the absence of quantifying evidence to substantiate the request. This appears to be a practice consistently followed by Commerce. *See Pig Iron From Canada; Final Results of Administrative Review of Antidumping Finding,* 46 Fed. Reg. 39,871, 39,872 (1981); *Antidumping—Precipitated Barium Carbonate From the Federal Republic of Germany; Final Determination of Sales at Less Than Fair Value,* 46 Fed. Reg. 25,494, 25,495 (1981); *Melamine in Crystal Form from the Netherlands; Antidumping: Dtermination [sic] of Sales at Less Than Fair Value,* 45 Fed. Reg. 20,152, 20,152–53 (1980); *Antidumping: Marine Radar Systems From the United Kingdom; Determinations of Sales at Less Than Fair Value,* 44 Fed. Reg. 49,322, 49,323 (1979), and subsequent cases, *see Low-Fuming Brazing Copper Rod and Wire From New Zealand; Preliminary Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 31,405, 31,406 (1985); *Final Determination of Sales at Less Than Fair Value; Portland Hydraulic Cement From Australia,* 48 Fed. Reg. 41,056, 41,057–41,058 (1983).

Commerce's position in this regard has been aptly stated as follows:

> We recognize that in certain circumstances, where sales are made at different levels of trade, an adjustment for such differences may be appropriate. However, we are unable to make such an adjustment in the instant case since we have been provided with no information establishing the price differential which would exist were there sales in Canada at the distributor level. In considering whether to make a level of trade adjustment, we cannot assume that cost differences associated with sales made at different levels of trade may reasonably be expected to result in price differences. In order to establish that there are differences which affect price comparability, information substantiating that the differences in the prices are the result of differences in the cost of selling at one level of trade as compared to the other must be submitted. Since the information provided is not sufficient to substantiate respondent's claimed cost-based adjustment, we did not make an adjustment.

Certain Tapered Journal Roller Bearings and Parts Thereof From Italy; Final Determination of Sales at Less Than Fair Value, 49 Fed. Reg. 2,278, 2,280 (1984).

The Court finds the position of Commerce is reasonable. When sales are made at different levels of trade, information submitted in support of a request for a grant of a level of trade adjustment must satisfactorily show that the different levels of trade in the home market and United States market affect price comparability. If the correlation between levels of trade and quantity sold in the subject markets is not substantially supported by the submitted evidence, then the claimed adjustments may be examined by the agency to see if they have been adequately quantified on the basis of cost differentials. *Silver Reed America, Inc.* v. *United States,* 7 CIT 23, 32,

581 F. Supp. 1290, 1296 (1984), *rev'd on other grounds sub nom. Consumer Products Div.* v. *Silver Reed of America, Inc.*, 753 F.2d 1033 (Fed. Cir. 1985), *CIT remand order vacated, Silver Reed America, Inc.* v. *United States*, 9 CIT 221 (1985).

In this case, Commerce was not provided with substantial evidence of quantified price *or* quantity differentials affecting the price comparability which would support SNPE's claim for level of trade adjustments. SNPE merely states it makes sales at different commercial levels of trade and that a discount offered on sales to a U.S. distributor should be the sole proof of affected price comparability and should establish the measure for a price differential. There is no evidence to support SNPE's claim the U.S. discount is a measure of a cost difference or that a quantified differential exists at different levels of trade. A level of trade adjustment is designed to compensate for differences in prices of products sold in different markets at different levels of trade. Here, SNPE has not established substantial differences to warrant a finding that Commerce's determination was unreasonable, unsubstantiated, or unlawful.

An administrative agency endowed with the authority to promulgate regulations is given broad discretion in the exercise of its expertise to interpret and implement those regulations. *See Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984); *United Electrical, Radio and Machine Workers of America* v. *United States*, —— CIT ——, ——, Slip Op. 87–95 at 12 (August 13, 1987). Similarly, it has been stated that "19 U.S.C. § 1677b(a)(4)(B) grants Commerce broad discretion in determining whether a circumstances of sale [i.e. different levels of trade] warrants an adjustment in foreign market value." *Carlisle Tire & Rubber Co.* v. *United States*, 9 CIT 520, 529, 622 F. Supp. 1071, 1079 (1985). It is this Court's duty upon review of a determination by Commerce which interprets and implements a regulation and to sustain the determination if "it is [not] plainly erroneous or inconsistent with the regulation." *Mast Industries, Inc.* v. *United States*, —— CIT ——, ——, 652 F. Supp. 1531, 1538 (1987), *aff'd*, —— F.2d ——, No. 87–1182 (Fed. Cir. 1987) (citation omitted).

Under the instant circumstances and in light of various Commerce determinations and cases, substantial evidence supports Commerce's interpretation and implementation of its regulation. It does not appear Commerce has constructed a two-prong test that is contrary to the statute. Commerce did not require both levels of trade exist in the home market, but rather required SNPE to prove its claimed cost differentials. Commerce's requirement of proof, specifically proof of cost differences, did not run counter to the statute. Although Commerce's position was not expressed as clearly as it could have been, this does not, in and of itself, constitute a basis for the Court to reverse and remand the determination.

SNPE also complains Commerce wrongfully rejected SNPE's submitted information concerning research and development (R&D) ex-

penses and instead utilized data of SNPE's R&D allocation costs in GOF contracting arrangements. SNPE argues its submitted information more accurately reflects the costs attributable to R&D for INC. SNPE urges Commerce base its decision on this alleged proof of actual costs rather than estimates, approximations, or averages emanating from the GOF contract allocation methodology.

Commerce claims it relied on SNPE's verified financial statements for its computation of SNPE's R&D costs for INC. Commerce maintains it rejected SNPE's submission because the date was a deviation from SNPE's normal accounting methods and had been reallocated specifically in response to the antidumping questionnaire. Commerce contends there was no verifiable evidence presented by SNPE in the record to substantiate SNPE's special allocation of R&D expenses. Commerce therefore utilized SNPE's normal financial statements, which were certified as consistent with generally-accepted accounting principles (GAAP). According to Commerce, the financial statements were the best information available for computation of the R&D portion of the cost of production.

In the final antidumping investigation, SNPE challenged Commerce's allocation of R&D expenses to INC production costs. Commerce responded as follows:

> In their response, SNPE deviated from their normal accounting practice by adjusting the R&D allocations to industrial nitrocellulose to exclude R&D they believe to have been associated with other product groups. [Commerce] accepts the accounting allocations of the responding firm for general, administrative and selling expenses as long as those allocations are the usual accounting practices of the respondent and are acceptable to [Commerce]. Consequently, we have recomputed the allocation for R&D in accordance with SNPE's normal accounting practices by spreading the R&D expenses over all products and have used this figure in calculating the cost of production for our final determination.

Final LTFV Determination, 48 Fed. Reg. at 21,617.

In antidumping investigations, Commerce will determine the foreign market value of imported merchandise under investigation on the basis of constructed value whenever there is reasonable belief the price of the merchandise sold in the country of exportation is less than the cost of production. 19 C.F.R. § 353.7 (1982). ("The cost of production will be computed on the basis of the best available information of costs of materials, labor and general expenses * * *.") The regulation provides that constructed value "shall be determined, from the best available information, by adding—(1) The cost of materials * * *; (2) An amount for general expenses and profit * * *; and (3) The cost of all containers * * *." 19 C.F.R. § 353.6 (1982); *see* 19 U.S.C. § 1677b(e) (1982). R&D expenses are considered general expenses. Pursuant to 19 U.S.C. § 1677b(e), Commerce cal-

culated the foreign market value of INC in the *Final LTFV Determination* by use of the constructed value method. 48 Fed. Reg. at 21,616.

Pursuant to the statute and regulations, Commerce generally determines cost of production by use of the best available information. Upon compiling the best available information, Commerce is given broad discretion in verifying, scrutinizing, and interpreting the data in order to formulate its determination. It is clearly within Commerce's "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council* v. *United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985).

In calculating cost of production Commerce will use the normal financial statements and records of the foreign exporter, except in cases where the circumstances and information cast reasonable doubt on the accuracy of actual costs. This includes situations in which costs are not accounted for according to the GAAP of the foreign exporter's country. *See Final Determinations of Sales at Less Than Fair Value: Hot-rolled Carbon Steel Plate and Hot-Rolled Carbon Steel Sheet From Brazil*, 49 Fed. Reg. 3,102, 3,105 (1985); *Fresh Cut Roses From Columbia; Final Determination of Sales at Less Than Fair Value*, 49 Fed. Reg. 30,765, 30,766 (1984); *Lightweight Polyester Filament Fabrics From the Republic of Korea; Final Determination of Sales at Less Than Fair Value*, 48 Fed. Reg. 49,679, 49,683–84 (1983); *Certain Iron Metal Castings from India; Antidumping: Final Determination of Sales at Not Less Than Fair Value*, 46 Fed. Reg. 39,869, 39,871 (1981).

Commerce chose SNPE's verified financial statements regarding SNPE's accounting practice of allocating the R&D expenses to all products. This practice was governed by pricing guidelines in the GOF government contracts. Commerce did not accept data submitted by SNPE but looked to normal allocations of R&D expenses as recorded in SNPE's books. Commerce experienced enormous difficulty with SNPE's submitted information. SNPE made special efforts to readjust and reallocate the R&D data. In response to Commerce's questionnaire, R&D costs which had previously been attributed to all products, were excluded from the calculated costs of INC production. The clear result of this action was to reduce INC R&D costs. Independent auditors hired by Commerce for the investigation found SNPE's methodology as well as its proposed special allocations of R&D expenses unreasonable and unverifiable. Furthermore, SNPE did not provide evidence to substantiate its adjusted allocations. There was insufficient evidence supporting SNPE's claimed R&D expenses with respect to specific products.

On the other hand, SNPE's normal financial statements, which were utilized by Commerce, were certified and verified by the investigating teams and found by Commerce to be consistent with GAAP. The verification teams were able to calculate SNPE's R&D costs

based on SNPE's financial statements and the employed allocation methodology.

In computing fair value in antidumping investigations, Commerce has great flexibility in employing its expertise. *Southwest Florida Winter Vegetable Growers Ass'n* v. *United States,* 7 CIT 99, 107, 584 F. Supp. 10, 18 (1984). That the petitioner is able to produce evidence, albeit unverified, in support of its own contentions and in opposition to the evidence supporting the agency's determination does not in and of itself demand reversal or remand of the agency's determination. It is the duty of the reviewing court to scrutinize the agency's decision and determine whether or not it is supported by substantial evidence on the record and is otherwise in accordance with law. *Matsushita Electric Industry Co., Ltd.* v. *United States,* 750 F.2d 927, 936 (1984). Commerce's decision to utilize verified information rather than SNPE's proposed allocation methodology was a reasonable decision in accordance with the broad discretionary powers vested in Commerce.

SNPE's last contention is Commerce erred in using an accelerated depreciation tax method rather than straight-line methodology in calculating SNPE's depreciation costs. SNPE argues that although it uses an accelerated depreciation method for tax purposes, this methodology does not accurately reflect SNPE's actual costs and therefore should be replaced with straight-line methodology for a more accurate computation.

Commerce defends its position much in the same way it defended its determination concerning R&D expenses:

> In their response, SNPE deviated from their normal accounting pactice [sic] by calculating depreciation on a straight-line basis. [Commerce] accepts the usual accounting practices of a respondent as long as those practices are acceptable under the Generally Acceptable Accounting Principles in the country of production. A respondent may not deviate from its normal accounting practices unless [Commerce] determines that their standard methodology is inappropriate. Since this is not the case, [Commerce] has used the accelerated method in calculating depreciation costs as reflected in SNPE's financial statement.

Final LTFV Determination, 48 Fed. Reg. 21,617.

Commerce urges it was SNPE's duty to come forth with verifiable substantiating evidence to support its claim that depreciation costs were more accurately calculated by straight-line methodology. Commerce utilized SNPE's normal financial records and statements, which were consistent with the GAAP, in order to measure the tax costs. Commerce alleges SNPE failed to produce substantial evidence contrary to Commerce's findings which would warrant the use of a different methodology.

Commerce's decision to calculate the cost of production from the petitioner's normal financial statements maintained in conformity

with the GAAP was a reasonable exercise of its discretionary powers in the absence of substantiating evidence that this methodology was a deviation or misrepresentation of SNPE's costs. SNPE, in its financial statements and records, employed an accelerated depreciation methodology in computing cost of production for French tax purposes. However, SNPE altered its methodology for depreciation purposes to a straight-line methodology when it submitted its questionnaire response to Commerce. This alteration resulted in a more favorable outcome to SNPE. Furthermore, SNPE failed to provide sufficient evidence to show Commerce's choice of accelerated depreciation distorted the depreciation costs.

Commerce's verification reports, on the other hand, provide substantial evidence to support Commerce's findings. Where the reviewing court is faced with two opposing views of the record, that of Commerce and that of the petitioner, it is the function of the Court to uphold the determination of the agency if it is substantiated by evidence on the record and is otherwise in accordance with law. The Court holds the determination by the agency, in this case, was supported by substantial evidence on the record and was otherwise in accordance with law. Commerce chose the best information available, i.e., the verified financial statements and records. These documents established SNPE's standard procedure was to employ the accelerated depreciation method. The other option for Commerce was to adopt SNPE's unverified allegations that straight-line depreciation methodology would more accurately reflect the actual costs. The record supports Commerce's decision.

3. *Court No. 83–09–01324*

Plaintiff Hercules, pursuant to Rule 56.1 of the Rules of this Court, moves for judgment upon the administrative record in this action, challenging certain aspects of the *Final LTFV Determination* by Commerce. Hercules urges this Court remand this matter to Commerce for a new determination because Commerce's first determination, although correctly finding INC from France was being sold by SNPE at less than fair value, was nevertheless erroneous in calculating the cost of production. The result according to Hercules was a lower calculated margin of less than fair value sales.

The antidumping statute requires the ITA compare United States price to foreign market value to determine whether a foreign manufacturer is dumping its products in the United States and at what margin. *See* 19 U.S.C. § 1673 (1982). Foreign market value may be based upon the home market price, third country price, or constructed value. *See* § 1677b (1982). The ITA must disregard any sales in the home market if it finds that the price was below the manufacturer's cost of production (COP). 19 U.S.C. § 1677b(b) (1982); 19 C.F.R. § 353.7 (1982). If remaining sales are inadequate to form a basis for calculating foreign market value, the ITA is required to use constructed value. *Id.*

The statute does not establish criteria for determining the COP, but does provide, along with Commerce's regulations, that COP will be based on the costs of materials, labor, and general expenses. 19 U.S.C. § 1677b(e)(1), 19 C.F.R. § 353.7(b). Included in general expenses are both finance and selling costs. Hercules claims Commerce incorrectly calculated these costs, resulting in a lower COP amount. Hercules argues had this error not occurred, Commerce's calculation would have produced a COP which would have exceeded the home market price. As such, Commerce would have used a constructed value rather than home market price as the basis for calculating the foreign market value of certain grades of INC. The Court finds Commerce's calculation of finance and selling costs was reasonable. The determination by Commerce is therefore sustained.

Commerce verified and accepted SNPE's allocation of its finance costs across all its products on a value added basis. Hercules argues SNPE should not have allocated finance costs equally over all products because there is evidence in the record SNPE actually incurred higher finance costs for producing INC than an equal allocation reflects. Hercules refers to the evidence of credit costs submitted by SNPE. These costs were significantly higher for INC than were the allocated finance costs submitted by SNPE. Essentially it is Hercules' position if SNPE claimed as an adjustment to foreign market value the cost incurred by SNPE extending credit to home market purchasers, Commerce must conclude these same costs are included in SNPE's cost of financing the production of INC.

The connection Hercules attempts to make between credit costs and finance costs is ill-founded. Commerce's policy on COP and constructed value principles is set forth as follows:

> All costs used in calculating COP or constructed value should be (1) based on the actual costs incurred by the company in question, and (2) valued in accordance with generally accepted accounting principles for the product under investigation. They should not be based upon "imputed costs" or "opportunity costs," as such terms are used in economic theory.

U.S. Department of Commerce, *Summary of COP & Constructed Value Principles,* Policy Paper Number 47, at 3 (1982) (footnote omitted).

Therefore, the costs to be included, by Commerce, in COP or constructed value computations, do not include imputed or opportunity costs. Such imputed or opportunity costs include instances in which companies extend credit to purchasers. *See* U.S. Department of Commerce, *Treatment of Opportunity Costs in COP Cases,* Policy Paper Number 16 (1982). When SNPE extends credit to home market purchasers, it loses the opportunity of otherwise investing the money and receiving a return on the investment. Nevertheless, such imputed or opportunity costs are not properly included in Commerce's calculation of COP.

Extension of credit to purchasers of goods is not treated as an actual cost. As stated above, such costs are merely opportunity or imputed costs. Consequently, SNPE's extension of credit to purchasers of SNPE's goods was not included in the cost of production analysis. This analysis is designed to ascertain the actual costs incurred by the manufacturer. *See* 19 U.S.C. § 1677b(e). Therefore, it was proper for Commerce not to have taken into account the costs of extending credit to purchasers when computing the finance costs for the COP calculations.

Hercules argues Commerce's determination concerning the cost of borrowing to SNPE erroneous. However, Commerce reasonably relied upon SNPE's allocation of its actual borrowing costs across its entire product line. Commerce's regulations provide for the use of the best information available in computing the actual costs of production. 19 C.F.R. § 353.7(b). Commerce accepted SNPE's finance cost figures as reflected in SNPE's financial statements and records because these records were verified and certified by independent sources as being consistent with the GAAP. The finance expenses, as well as other general costs, were verified to be in conformity with SNPE's balance sheet. SNPE's financial statements did not distort actual costs or misrepresent SNPE's finance costs. Commerce's choice of information was consistent with its usual practice. *See Final Determination of Sales at Less Than Fair Value: Hot-rolled Carbon Steel Plate and Hot-Rolled Carbon Steel Sheet From Brazil,* 49 Fed. Reg. 3,102, 3,105 (1984). Hercules produced inadequate evidence to establish Commerce's determination was unsubstantiated by the record or otherwise not in accordance with law. Review of a determination by the Court is limited: "Under present law it is not for the Court to impose its preferred choices on Commerce with respect to the sufficiency of its investigation or the wisdom of its methods so long as there is support in the record as a whole for its determination and its methods are in accordance with law." *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 524, 622 F. Supp. 1071, 1075 (1985). The Court finds there was support in the record for Commerce's decision to utilize the finance costs contained in SNPE's verified financial statements as the best information available to compute cost of production. Commerce's decision was therefore in accordance with law.

Commerce accepted and verified the selling expenses reported by SNPE. In its calculations of COP, Hercules attributed these expenses solely to INC and allocated them evenly to sales to related and unrelated parties. Hercules argues Commerce should have rejected SNPE's allocation of INC selling expenses to remain consistent with Commerce's practice of excluding SNPE's prices of sales to related customers as sales are sufficiently held at arm's length. Hercules contends Commerce should not have used these prices to determine foreign market value pursuant to 19 C.F.R. § 353.22(b). Commerce defends its decision as a reasonable action within its

bounds of discretion, having verified the statement and having little evidence to find differently. This Court agrees Commerce reasonably exercised its discretionary authority.

Hercules contends that since sales to related purchasers are taken into account when computing home market price, such sales must also be considered when computing COP. Hercules employs reference to 19 C.F.R. § 353.22(b) as support for its contention. Section 353.22(b) sets forth guidelines in determining foreign market value as it applies to transactions between related parties:

> (b) *Sales to related persons.* If such or similar merchandise is sold, or in the absence of sales, offered for sale in the home market or, as appropriate, to third countries, to a person related to the seller of the merchandise in any of the respects described in section 771(13) of the Act, the price at which such or similar merchandise is sold or, in the absence of sales, offered for sale to such person *ordinarily will not be used in the determination of foreign market value* unless such sales are demonstrated to the satisfaction of the Secretary to be at prices comparable to those at which such or similar merchandise is sold to persons unrelated to the seller.

19 C.F.R. § 353.22(b) (1982) (emphasis added).

Commerce contends the applicability of § 353.22(b) upon the instant issue is minimal at best. Section 353.22(b) only applies to home market or third country sales. It is not applicable in guiding Commerce in determining constructed value or COP. Furthermore, § 353.22(b) generally requires rejection of sales to related parties as a basis for foreign market value unless such sales are shown to be at prices comparable to unrelated parties. This standard is wholly dissimilar to that which is employed in determining COP and constructed value, which allow, inter alia, the calculation of general expenses, of which selling expenses, direct or indirect, are included. *See* 19 U.S.C. § 1677b(e); 19 C.F.R. 353.7(b); 19 U.S.C. § 1677(e)(1)(B); 19 C.F.R. § 353.6(a)(2); *Certain Electric Motors from Japan: Final Results of Administrative Review of Antidumping Duty Order,* 49 Fed. Reg. 32,627, 32,631 (1984) ("We define the term general expenses as 'general, administrative and selling' expenses incurred in selling the same general class or kind of merchandise *in the home market*").

Commerce, in the absence of a definition of general expenses in § 353.7(b) as it refers to COP, relies upon 19 U.S.C. 1677b(e)(1) pertaining to the calculation of constructed value. This subsection provides as follows:

> (2) **Transactions disregarded; best evidence.**—For the purposes of this subsection, a transaction directly or indirectly between persons specified in any one of the subparagraphs in paragraph (3) of this subsection may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the

> amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the subparagraphs in paragraph (3) of this section.

19 U.S.C.A. § 1677b(e)(2) (1982) (paragraph 3 sets forth what constitutes "related parties").

Commerce argues § 1677b(e)(2) grants Commerce discretion in considering related party transactions when calculating constructed value. Commerce argues it "may" disregard sales to related parties in constructing the indirect sales expense cost when those sales figures do not "fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration."*Id.* In further support of its argument, Commerce cites the implementing regulation of § 1677b(e)(2), which is 19 C.F.R. § 353.6(b), and which provides "[d]irect or indirect transactions between related parties * * * may be disregarded [where the proper amount is not fairly reflected]." 19 C.F.R. § 353.6(b) (1982). This interpretation by Commerce appears to be reasonable. *Cf. Certain Electric Motors from Japan; Antidumping: Final Determination of Sales of Large Motors at Less Than Fair Value and Suspension of Investigation for Small Motors,* 45 Fed. Reg. 73,723, 73,726 (1980) (general expenses examined as elements of loss in related party transactions).

The record supports Commerce's determination to accept SNPE's INC selling expenses that were evenly allocated over sales to related and unrelated parties. Commerce properly exercised its discretionary powers in accordance with a reasonable interpretation of its regulations with regard to the calculation of selling expenses in a COP analysis. The accepted information was verified as reliably reflecting the cost element in question. Commerce had no reason to ascertain whether or not selling expenses from sales transacted with related customers were significantly lower than those expenses from sales to unrelated parties, either from the record or from Hercules unsubstantiated allegations. It has been held Commerce's implementation of its statutory authority shall be sustained by this Court unless it was done unreasonably or contrary to the statute. *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 928 (Fed. Cir. 1984).

The Court finds Commerce's calculations of SNPE's cost of producing INC with respect to the finance and selling costs were reasonable, substantiated by the record, and in accordance with law. Accordingly, the determination and calculation of the antidumping margin is sustained.

CONCLUSION

In accordance with the Court's opinion set forth above, the final countervailing duty and antidumping determinations of Commerce and the ITC are sustained. The respective motions by SNPE and Hercules for judgment on the agency records are denied, and all actions are hereby dismissed.

Judgment will be entered accordingly.

ABSTRACTED CLASSIFIC

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C87/175	Watson, J. October 1, 1987	H.S. America Corp.	85–10–01397	Item 700.57 37.5%
C87/176	Watson, J. October 1, 1987	Sea Farm of Norway, Inc.	87–5–00654	Item 355.45 $0.09 per lb. + 22.8%
C87/177	Aquilino, J. October 1, 1987	W.R. Zanes & Co.	85–9–01244	Item 709.1540 11.7%
C87/178	Re, C.J. October 5, 1987	Sangamo Capacitor Division	75–5–00791, etc.	Item 685.80 10%
C87/179	Restani, J. October 5, 1987	Algoma Tube Corp.	80–10–01725	Item 610.42 or 610.43 Various rates
C87/180	Re, C.J. October 8, 1987	Sangamo Capacitor Division	78–7–01369, etc.	Merchandise classified as electrical capacitors fixed or variable at 10%
C87/181	DiCarlo, J. October 5, 1987	Pharmacia Inc.	85–3–00381	Item 711.88 8.6%
C87/182	Re, C. J. October 8, 1987	Sangamo Capacitor Division	79–2–00333	Merchandise classified as electrical capacitors, fixed or variable at 10%

CATION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item No. and rate		
	Item 700.45 85.% Item 700.43 10%	Agreed statement of facts	Boston Boots
	Item 386.13 12.5%	Agreed statement of facts	Seattle Fish farm pen-nets
	Item 851.60 Free of duty	Agreed statement of facts	New York Repair components for certain cancer detection equipment
	Item A516.94 or A656.15 Free of duty	Sangamo Capacitor Division v. U.S., 779 F.2d 30 (Fed. Cir. 1980)	Greenville-Spartanburg Silver mica plates
	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and nonalloy steel plain-end oilwell casings
	Item A516.94 or A656.15 Free of duty	Sangamo Capacitor Division v. U.S., 779 F.2d 30 (1985)	Greenville-Spartanburg Silver mica plates
	Item 661.95 4.7%	Pharmacia Fine Chemicals Inc. v. U.S., 9 CIT 438 (1985)	New York Columns
	Item A516.94 or A656.15 Free of duty	Sangamo Capacitor Division v. U.S., 779 F.2d 30 (1985)	Greenville-Spartanburg Silvered mica plates

ABSTRACTED CLASSIFICATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C87/183	Tsoucalas, J. October 14, 1987	CR Industries	86-4-00425	Item 681.39 or 651.47 Various rates
C87/184	Watson, J. October 22, 1987	Arrow Trading Co.	84-8-01191	Item 685.24 8.2%

N DECISIONS — Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
e	Item No. and rate		
us	Item 692.27 or 692.32 Various rates Item 680.90 or 681.39 Various rates	Agreed statement of facts	Blaine Speedi-Sleeves
	Item 911.95 Free of duty	Agreed statement of facts	New York Clock radio portion of certain clock radios

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V87/317	Watson, J. October 1, 1987	C.M. Import & Export Corp.	R62/6992, etc.	Export value
V87/318	Restani, J. October 1, 1987	Nissho-Iwai American Corp.	87–7–00929, etc.	American selling price
V87/319	Watson, J. October 6, 1987	Texas Instruments Inc.	82–5–00748, etc.	Constructed value
V87/320	Watson, J. October 8, 1987	A & A Trading Corp.	R61/8676, etc.	Export value
V87/321	Watson, J. October 8, 1987	Cohn Hall Marx	R62/12791, etc.	Export value
V87/322	Watson, J. October 8, 1987	Jemsa Plastics Corp.	R64/2635, etc.	Export value

LUATION DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	$10.87, $6.34, $6.18 or $5.94	Agreed statement of facts	San Francisco Radios with cases
	Refund duties in the amount of $9,207,479.00 plus interest	Agreed statement of facts	Not stated Footwear
	At net value on the summonses	Agreed statement of facts	Dallas Semiconductor devices
	Appraised values shown on entry papers less amounts attributable to buying commission	A & A Trading Corp. v. U.S., C.D. 4472	Boston Various electrical articles
	Appraised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	San Francisco Silk piece goods
	Appraised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	New York Transceivers

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